(23,895)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 274.

W. T. PRICE, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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1 At a Supreme Court Begun and Held at Springfield, on Tuesday, the First Day of October, in the Year of Our Lord One Thousand Nine Hundred and Twelve, within and for the State of Illinois.

Present:

The Honorable Frank K. Dunn, Chief Justice.
Honorable James H. Cartwright, Justice.
Honorable William M. Farmer, Justice.
Honorable Orrin N. Carter, Justice.
Honorable John P. Hand, Justice.
Honorable Alonzo K. Vickers, Justice.
Honorable George A. Cooke, Justice.
William H. Stead, Attorney General.
Warren C. Murray, Marshal.

Attest:
J. McCANN DAVIS, *Clerk*.

Be it remembered that to-wit on the Tenth day of September, A. D. 1912, the same being one of the days in vacation before the October term, 1912, of the Supreme Court, a record of the proceedings in the Municipal Court of the City of Chicago was filed by plaintiff in error, W. T. Price, in the office of the Clerk of the Supreme Court in words and figures following, to-wit:

2 8408. 27.

The Municipal Court of Chicago.

Gen. No. 39402.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
W. T. PRICE.

Transcript of Proceedings.

Homer K. Galpin, Clerk.

Filed Sep. 10, 1912. J. McCan Davis, Clerk of Supreme Court.

3 The Municipal Court.

Transcript of Proceedings.

UNITED STATES OF AMERICA,
State of Illinois, County of
Cook, City of Chicago, ss:

In the Municipal Court of Chicago.

Pleas, Proceedings and Judgments before the Municipal Court of Chicago, held in the City of Chicago, in the County of Cook and State of Illinois, at the places in the First District in said City provided by the corporate authorities of said City for the holding of said court, in the year of our Lord, one thousand nine hundred and twelve and of the Independence of the United States, the one hundred and thirty-seventh.

Present:

Honorable Freeman K. Blake, one of the Judges of The Municipal Court of Chicago.
John E. W. Wayman, State's Attorney.
Thomas M. Hunter, Bailiff.

Attest:
HOMER K. GALPIN, *Clerk.*

Be it remembered, to-wit; that on the 3rd day of August, A. D. 1912, the following among other proceedings were had in said court and entered of record therein, to-wit:

No. 39402.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
W. T. PRICE.

Criminal.

4 Be it remembered, that afterwards. to-wit: on the 20th day of February, A. D. 1912, the following among other proceedings were had and entered of record in said Municipal Court, which proceedings were and are in words and figures following, to-wit:

Present:

Honorable Freeman K. Blake, One of the Judges of the Municipal Court of Chicago.
John E. W. Wayman, State's Attorney.
Thomas M. Hunter, Bailiff.
Homer K. Galpin, Clerk.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
W. T. PRICE.

Now come the said People by the State's Attorney, and the defendant as well in his own proper person as by counsel also comes, and thereupon leave is granted defendant herein to file an affidavit of merits in ten days; and it is further ordered by the Court that further hearing in this cause be and the same is hereby postponed to nine thirty A. M. on the eleventh day of March, A. D. 1912.

5 Be it remembered, that on the same day to-wit: on the 20th day of February, A. D. 1912, a certain Præcipe and Statement of Claim was filed in the office of the Clerk of said Municipal Court, in words and figures following, to-wit:

The Municipal Court.

Præcipe and Statement of Claim in 4th Class Contract Cases—Affidavit of Plaintiff's Claim.

STATE OF ILLINOIS,
County of Cook, City of
Chicago, 1st District, ss:

In the Municipal Court of Chicago.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
W. T. PRICE.

In debt. Claim for $100.00.

To the Clerk:

Please issue a summons returnable at 9.30 A. M. Sharp, on the — day of February 1912.

Statement of Claim.

Plaintiff's claim is for a fine of one hundred dollars, as provided for a first offense, for a violation of the "Dairy and Food Law" (Chapter 127-B, Hurd's Revised Statutes).

It is the contention of the plaintiff that the defendant W. T. Price, on, to-wit, August 30th, 1911, at Chicago, in the said County, did unlawfully manufacture for sale, offer for sale and sell, a certain preservative compound known as Mrs. Price's Canning Compound intended as a preservative of food, which was then and there unwholesome and injurious in that it contained boric acid, 6 an unwholesome and injurious substance, in violation of the Act aforesaid.

CHAS. F. McKINLEY,
Attorney for Plaintiff.

Manhattan Building, Chicago, Business or Residence Address.

STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

Affidavit of Plaintiff's Claim.

Frank J. Hoey being first duly sworn, on oath states that he makes this affidavit on behalf of plaintiff in the above entitled cause; that the said cause is a suit in debt for the payment of money; that the nature of plaintiff's demand is for a penalty for violation of the State Dairy and Food Law and that there is due to plaintiff from the defendant after allowing to the defendant all just credits, deductions and set offs the sum of not exceeding one hundred dollars and — cents ($—).

FRANK J. HOEY.

Subscribed and sworn to before me this — day of February 1912.

[SEAL.] LAURA COLLINS,
Notary Public.

7 Be it remembered, that on the same day, towit: on the 20th day of February A. D. 1912, a certain Appearance was filed in the office of the Clerk of said Municipal Court, in words and figures following, to-wit:

The Municipal Court.

STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

In the Municipal Court of Chicago.

Class —. No. —.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
W. T. PRICE.

Appearance.

I hereby enter the appearance of W. T. Price defendant and as his attorney in the above entitled cause.

TOLMAN & REDFIELD,
HOWARD W. HAYES,
Defendant's Attorney-.

Be it remembered, that afterwards, to-wit: on the 14th day of May A. D. 1912, a certain Jury Waiver was filed in the office of the Clerk of said Municipal Court, in words and figures following, to-wit:

The Municipal Court.

Jury Waiver—State Case.

STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

In the Municipal Court of Chicago.

Criminal. No. —. For —.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
W. T. PRICE.

8 I, the undersigned defendant in the above entitled cause, being duly advised by the Court as to my right to a trial by jury in the above cause, hereby waive a trial by jury in said cause and agree that said cause shall be submitted to the Court for trial without a jury.

W. T. PRICE.

Be it remembered, that afterwards, towit: on the 29th day of July, A. D. 1912, the following among other proceedings were had and entered of record in said Municipal Court, which proceedings were and are in words and figures following, to-wit:

Present:

Honorable J. D. Turnbaugh, One of the Judges of the Municipal Court of Chicago.
John E. W. Wayman, State's Attorney.
Thomas M. Hunter, Bailiff.
Homer K. Galpin, Clerk.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
W. T. PRICE.

Now come the said People by the State's Attorney, and the defendant as well in his own proper person as by counsel also comes, and thereupon it is ordered that this cause be and the same is hereby transferred to the Chief Justice of this Court for assignment or such other disposition thereof as he may deem proper.

9 Be it remembered, that afterwards, to-wit: on the 29th day of July, A. D. 1912, the following among other proceedings were had and entered of record in said Municipal court, which proceedings were and are in words and figures following, to-wit:

Present:

Honorable Freeman K. Blake, one of the Judges of the Municipal Court of Chicago.
John E. W. Wayman, State's Attorney.
Thomas M. Hunter, Bailiff.
Homer K. Galpin, Clerk.

THE PEOPLE OF THE STATE OF ILLINOIS
VS.
W. T. PRICE.

And thereupon this cause comes on for hearing on defendant's motion to dismiss this cause heretofore entered herein, and the Court being fully advised in the premises, overrules said motion.

Now comes the said People by the State's Attorney, and the defendant W. T. Price in his own proper person also comes, and the said defendant being duly arraigned and forthwith demanded of and concerning the charge alleged against him in the information herein how he will acquit himself thereof, for a plea in that behalf says that he is not guilty in manner and form as charged in said information.

The said defendant being duly advised by the Court as to his right to a trial by jury in this cause, elects to waive a trial
10 by jury and now here executes a formal waiver in writing of
a trial by jury, which waiver of jury trial is filed in this cause, and this cause is, by agreement in open Court between the parties hereto, submitted to the Court for trial without a jury.

This cause having been submitted to the Court for trial without a jury, the said people being represented here by the State's Attorney, and said defendant being present in his own proper person as well as represented by counsel, the trial of this cause is now here commenced, and after progress therein, said trial being not yet completed, it is ordered that further proceedings in this cause be and they are hereby postponed until nine thirty A. M. on the third day of August A. D. 1912.

Be it remembered, that afterwards, to-wit, on the 3rd day of August. A. D. 1912, the following among other proceedings were had and entered of record in said Municipal Court, which proceedings were and are in words and figures following, to-wit:

Present:

Honorable Freeman K. Blake, One of the Judges of the Municipal Court of Chicago.
John E. W. Wyman, State's Attorney.
Thomas M. Hunter, Bailiff.
Homer K. Galpin, Clerk.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
W. T. PRICE.

Now come the said People by the State's Attorney, and the defendant as well in his own proper person as by counsel also 11 comes, whereupon the trial of this cause before the Court is now here resumed, and the Court having heard the testimony of the witnesses in this cause and the arguments of counsel, this cause is submitted to the Court for decision herein.

And thereupon the Court being fully advised in the premises, finds the defendant guilty of a violation of the Dairy and Food Law known as Chapter 127, B. R. D.

It is therefore considered, ordered and adjudged that said defendant W. T. Price, because of said judgment of guilty, be and he is hereby sentenced to pay to the Clerk of this Court, to be by said Clerk disposed of according to law, a fine in the sum of Fifty dollars ($50.00) and also the costs of this suit taxed at Six Dollars ($6.00).

It is further ordered by the Court that the defendant file herein an appeal bond conditioned according to law in the sum of Two Hundred dollars, ($200.00) with security to be approved by a Judge of this Court.

Be it remembered, that on the same day to-wit, on the 20th day of August A. D. 1912, a certain Writ of Error was filed in the office of the Clerk of said Municipal Court, in words and figures following, to-wit:

12 STATE OF ILLINOIS,
Supreme Court, ss:

The People of the State of Illinois to the Clerk of the Municipal Court of City of Chicago, Greeting:

Because, in the Record and proceedings, as also in the rendition of the Judgment of a plea which was in the Municipal Court of City of Chicago before the Judge thereof, between People of the State of Illinois and W. T. Price, it is said manifest error hath intervened, to the injury of the aforesaid W. T. Price, as we are informed by his complaint, and we being willing that Error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the Record and proceeding of the plaint aforesaid, with all things touching the same, under your seal so that we may have the same before our justices aforesaid at Springfield, on the first Tuesday of October next, that the Record and proceedings, being inspected, we may cause to be done therein to correct the Error, what of right ought to be done according to law.

Witness, The Hon. Frank K. Dunn, Chief Justice of our Court, and the seal thereof, at Springfield, this 19th day of August, in the year of our Lord one thousand nine hundred and twelve

[SEAL.] J. McCANN DAVIS,
Clerk of the Supreme Court.

13 Be it remembered, that afterwards, to-wit, on the 21st day of August, A. D. 1912, the following among other proceedings were had and entered of record in said Municipal Court, which proceedings were and are in the words and figures following, to-wit:

Present:

Honorable Hosea W. Wells, one of the Judges of the Municipal Court of Chicago.
John E. W. Wayman, State's Attorney.
Thomas M. Hunter, Bailiff.
Homer K. Galpin, Clerk.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
W. T. PRICE.

Now come the said People by the State's Attorney, and the defendant as well in his own proper person as by counsel also comes, and thereupon the defendant moves the Court that the time in which to file bill of exceptions herein be and the same is hereby extended to September 10th A. D. 1912.

Be it remembered, that afterwards, to-wit, on the 5th day of September, A. D. 1912, a certain Bill of Exceptions was filed in the office of the Clerk of said Municipal Court, in words and figures following, towit:

14 Filed — the Municipal Court of Chicago, Sept. 5, 1912.
Homer K. Galpin, Clerk.

STATE OF ILLINOIS,
City of Chicago, First District, ss:

In the Municipal Court of Chicago.

No. 34902.

THE PEOPLE OF THE STATE OF ILLINOIS
vs.
W. T. PRICE.

Violation of the Dairy & Food Law. Chap. 127-B, Hurd's Revised Statutes.

Bill of Exceptions.

Be it remembered that heretofore, on to-wit, the 22nd day of April, A. D. 1912, and certain days thereafter as hereinafter set forth, the following proceedings were had before the Honorable Freeman K. Blake, one of the Judges of said Court, before whom the above entitled cause was heard, and by whom the same was tried without a jury, trial by jury being expressly waived.

Present:

John E. W. Wayman, State's Attorney, and Mr. Charles F. McKinley, on behalf of the People.

Mr. Trafford N. Jayne, Mr. Howard W. Hayes, and Messrs. Tolman & Redfield, by Mr. Henry P. Chandler, on behalf of the defendant.

15 On behalf of the People there was introduced in evidence a certain stipulation of facts duly entered into by and on behalf of each of the parties hereto, which said stipulation was in words and figures as follows, to-wit:

"STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

In the Municipal Court of Chicago.

PEOPLE
v.
W. T. PRICE.

"The following stipulation of facts is hereby entered into and agreed upon in this case, to-wit:

'That the defendant, W. T. Price, on or about August 30, 1911, at Chicago, in said County, offered for sale and sold, two packages of a preservation known as Mrs. Price's canning compound; that said canning compound contained 'boric acid'; that the label on said packages bears the following statement; 'It is not claimed for this Compound that it contains anything of food value, but it is an antiseptic preparation, and among its many uses may be employed to prevent canned fruits and vegetables from souring and spoiling.'

That said preservative was not offered for sale or sold in any food product, but was offered for sale and sold separate and apart as a preservative; and that the defendant was accorded a hearing before the State Food Commission pursuant to the provisions of the Food Law.

CHAS. F. McKINLEY,
Attorney for Plaintiff.
HOWARD W. HAYES,
Attorney for Defendant.

16 There was also introduced in evidence on behalf of the people a certain envelope used for enclosing the compound, known as Mrs. Price's Canning Compound, referred to in the above stipulation which said envelope was in words and figures as follows, to-wit:

(On the front of the envelope appears the following:)

Mrs. Price's Canning Compound, Manufactured by The Price Compound Company, Minneapolis, Minn.

May be used in canning all kinds of fruit, and is especially valuable for Corn, Beans, Peas, Asparagus, Tomatoes, etc.

May also be used in making Catsup, Sweet Pickles or anything that is liable to ferment. It saves money, time, labor, worry, and insures the best results. See book of directions for instruction in using the Compound, and how to do all kinds of canning.

Book with free samples sent to any address on application.

The contents of this package is sufficient for four quarts.

For compound or information call on *or* agent or address

Mrs. W. T. Price, 1605 Penn. Avenue North, Minneapolis, Minn.

(Serial No. 7557. Guaranteed by the Price Compound Co. under the Food and Drug act of June 30th, 1906.)

(On the back of the envelope appears the following:)

Notice to Purchasers.

It is not claimed for this compound that it contains anything of food value but it is an antiseptic preparation and among its many uses may be employed to prevent canned fruits and vegetables from souring and spoiling.

READ THIS ALSO.—We have explained in our Receipt Booklet how dangers from metal top cans may be overcome, but we find our own glass top cans, such as Lightning and Globe are not closing as tightly as they did when new, owing to the wire bail 17 giving, and supposing others may meet with the same difficulty, we suggest you make a thick fold of paper and place on top the cover and then spring the lever down, thus making the can perfectly tight; also do not use those cheap, hard, can rubbers, but buy the best and do not use them when they are not as good as new.

Retail Price.

1 Package 10¢. 3 Packages 25¢. 7 Packages, 50¢. 15 Packages $1.00.

Thereupon the People rested. At the close of the plaintiff's case the defendant, by his attorneys, moved the Court to dismiss the complaint, and find the defendant not guilty. Which said motion was thereupon argued by counsel for the respective parties. At the conclusion of said arguments, the Court took the motion under advisement.

Thereafter, on, to-wit, June 29, 1912, the Court overruled said motion of the defendant; to which action of the Court in overruling said motion, the defendant, by his counsel, then and there duly excepted.

Thereafter, there was offered certain evidence on behalf of the defendant, as shown in the following transcript of proceedings, to-wit:

18 Mr. Chandler: If the Court please, Mr. McKinley and I have agreed we may prove certain facts, and Mr. McKinley will state his objections.

Mr. McKinley: They make an offer to prove certain facts. The status of the case is this: The State and the defendant entered into a stipulation of facts, and those facts cover all the evidence that the State desired to prove.

The Court: The State has rested?

Mr. McKinley: Yes; and at the close of that the defendant made a motion to dismiss. Your Honor has overruled the motion, as I understand it now, and the defendant on his part, offers to prove certain facts.

Mr. Chandler: The defendant on his part offers to prove certain facts.

Mr. McKinley (continuing): And I will make objection to certain portions of it.

Mr. Chandler: I will take them up, each one separately.

We first offer to prove that Price Canning Compound is an article of commerce, which has been sold under that distinct name for a period of years with the ingredients and in the proportions contained in the sample taken by the Food Department, which is the subject of this suit; that it has acquired a wide reputation over a large number of states in the Union, as a distinctive article used for canning by the housewife; that it is not sold by us—by the defendant—in any food, nor as a food; nor is it sold to manufacturers of food, or canners of food, for sale; that boric acid is a constituent part of the compound, and has been such during all the time that the compound has been sold; that in the sample taken by the Food Department, and in fact, in any other goods sold by this defendant,
19 there is no added ingredient of any kind whatever, whether it be injurious, deleterious, or otherwise.

The Court: Is there any objection to that offer?

Mr. McKinley: Yes; there is. I will read from the stipulation of facts.

I object to that portion of the offer, that it was not sold in any food, nor as an article of food—I think that part is fully covered by the stipulation, and I will object to it being admitted in evidence.

Mr. Chandler: According to the stipulation it doesn't do any harm.

The Court: Of course any fact covered by the stipulation of facts would be an agreed fact, and any offer in evidence by the defendant would not be material or competent on objection.

Mr. Chandler: That is not inconsistent with the stipulation, however.

Mr. McKinley: I think it is covered by the stipulation.

(Continuing:) And to that portion, also, of the first offer which starts in by saying that there is no added ingredient, and so forth.

Mr. Chandler: What is the ground of the objection to that?

Mr. McKinley: Why, the objection to that is that it partially involves a question of law, in addition to a question of fact. There is a section of the Food Law which says that an article shall be deemed adulterated which contains any added poisonous or deleterious substance. As I said, I think that offer involves a question of law, and also a question of fact. The facts are fully set out in the stipulation, and in the sample offered in evidence, as to what it is.

Mr. Chandler: We are endeavoring to prove that fact.

Mr. McKinley: I think you are endeavoring to indulge a little bit——

20 The Court: I do not see, either way, what difference the first part of this offer will make; that is, I do not see that it is material, to show that the Price Canning Compound is an article of commerce, and so forth.

Mr. McKinley: We are not objecting to that. I only object to that portion where it says it has only been sold as a food—in the article covered in the stipulation—and the further ground that there is no added ingredient.

The Court: On the added fact here that I see to that first proposition that was objected to, the statement that it is not sold to manufacturers of food, or canners of food, for sale.

Mr. McKinley: We have no objection to that.

The Court: That fact is not covered in the stipulation.

Mr. McKinley: I have no objection to that.

Mr. Chandler: Will you admit that?

Mr. McKinley: No, I will admit that you testified to that.

The Court: That it is not sold by the defendant in any food, nor as a food, that is covered by stipulation, and that it is not sold to manufacturers of food, or canners of food for sale,—do you want to admit that the witnesses for the defendant will so testify?

Mr. McKinley: Yes.

Mr. Chandler: That will be sufficient, otherwise, we can agree to put Mr. Jayne on the stand.

Mr. McKinley: That is admitted.

Mr. Chandler: It is admitted that the defendant's testimony would show that Price Canning Compound was not sold to manufacturers of food, or canners of food, for sale.

The Court: And that the witness by whom you expect to prove those facts is present in court, ready to be sworn, and would
21 go on the witness stand expecting to so testify.

Mr. Chandler: Yes, thank you.

The Court: Now, "that boric acid is a constituent part of the Compound, and has been such during all of the time that the Compound has been sold."

Mr. McKinley: I have no objection to that, that is part of the stipulation of fact.

The Court: It is stipulated that boric acid is part of the product, the sample. No, it is stipulated here—well, practically, yes—there were two packages that were presented here that contained boric acid. This is a little broader. It says, "That boric acid is a constituent part of the Compound," not only as to the two samples, but as to the articles of commerce that have been objected to, and has been such during all the time that the Compound has been sold. Are you willing to admit that the witness present, if sworn, and put upon the witness stand would testify as to those facts?

Mr. McKinley: Yes, we concede that. I think Mr. Jayne stated on the trial that it was practically boric acid.

The Court: Let it go in, then.

Mr. Chandler: And that it will have the same effect as if he had really so testified?

Mr. McKinley: Oh yes, we concede that.

The Court: That there is no added ingredient of any kind whatever, whether it be injurious, deleterious, or otherwise,—that last part, is the one I understand you object to.

Mr. McKinley: Yes, that is the serious one; that is a question involving the law and fact.

The Court: How is that material?

Mr. Chandler: If your Honor please, the Statute provides, Section VIII, that for the purposes of this Act, an article shall be
deemed to be adulterated—then it takes up the number of
22 articles, first, confectionery, and then in the case of food—
and then under that there are five subdivisions to the effect
that if it contains any other added poisons or other deleterious ingredients which may render it injurious to health—in other words the Acts seem to condemn preservatives or articles of commerce which contain this added deleterious substance.

The Court: It is not claimed in this case that this Compound contains any other added deleterious ingredients, except boric acid. It is admitted it does contain boric acid.

Mr. Chandler: We contend it is not added any more than any other parts have been added; all the elements, have been part of it from the beginning; the constituent elements have been combined.

The Court: It is not admitted on either side that this is pure boric acid.

Mr. Chandler: How about that, Mr. McKinley?

Mr. McKinley: Oh, no.

The Court: As I understand it, all the way through, the case proceeded on that assumption, that this Compound by its very name, by the admissions of the parties, is composed of various ingredients which do not appear, except, that it is admitted that one of those ingredients is boric acid.

Mr. McKinley: I think we showed that was the principal ingredient; as to what there was in there we did not show.

Mr. Chandler: It does not appear yet in any admission or statements of counsel or in any manner, in the case, up to this point what the Compound is composed of. The only fact that does appear at all in reference to anything condemned by the Statute is that it does contain boric acid, and boric acid exists in combination with other ingredients. I think Mr. Jayne is more familiar with that,
however.

23 Mr. Jayne: The proposition is just this. Price Canning
Compound is a Compound as such. It is not merely an

hodge-podge of ingredients, but it is an article of commerce all by itself—Price Canning Compound. The State says because our Compound contains boric acid it is illegal. Now, we say that the Statute—that is, the Fifth Section,—which is the section under which they claim it is illegal, does not apply to us at all, for the reason that that only applies to added deleterious ingredients, or added ingredients to the thing, whatever it is, of the thing that they desire to condemn.

We hold that Price Canning Compound is Price Canning Compound. It has been Price Canning Compound for years. It is an article all by itself—Price Canning Compound—and that Compound is made up of certain parts, and one of those parts is boric acid, but the Compound is the Compound.

The Court: The compound does not exist in the state of nature. As I understand it, it is the production of some process of manufacture.

Mr. Jayne: Very true, your Honor, we admit it is a compound, there is no question about that. This added proposition is squarely in line with the decision of the United States Supreme Court which we cited to your Honor. That was the Coca Cola case in Tennessee, and the Government contended that Coca Cola was under the ban for the reason because it contained caffeen; that was the proposition, and they locked horns squarely on that proposition.

The Government said that coca cola contained caffeen, that caffeen is injurious, and therefore, coca cola is injurious, and you must stop selling it.

The defenses were two.

24 First, caffeen is not injurious, and secondly, even if it is injurious, under the Statute which provides exactly as this Statute does, as to added ingredients, poisonous ingredients, that it would not affect them.

They claimed caffeen is in coco cola, but it is not an added ingredient; it is original coco cola; it is a combination of things, but it is coca cola. It has been known all over the United States as such.

The Court held the words, "added ingredient" meant something; that the word "added" must mean that whatever was there that was deleterious or injurious must be added to whatever the article was; and the Court held that coca cola was an article of commerce, sold as such, with various ingredients, and that it contained caffeen.

The Court says, "We do not decide whether caffeen is injurious or not, but we do hold that caffeen is not an added ingredient, because it is the original ingredient of the compound called "coca cola". That Statute is the same as this Statute.

We say that the Price Canning Compound has been sold as such, has that product name, has had the same ingredients, and in the same proportions and amounts for years, and there is no added ingredient of any kind, and that is wherein we are——

Mr. McKinley: We are not proceeding under the first part of Paragraph 5 of Section 8. This prosecution is based first on Section XXII, which forbids the sale of any preservative which is unwholesome or deleterious, whether it be a simple mixture or a compound

that is Section XXII of the Law. Then we rely on the last part of
Paragraph 5 of Section 8 to show that boric acid is injurious,
25 so the question of an added deleterious ingredient, in our
opinion, does not enter into the case.

Now, if we were prosecuting for the sale of a finished food article, we probably would have to prove there that it was an added ingredient, as in the coca cola case. It was incumbent on them to show that caffeen was added. It was not added, it was in the leaves or in the coca cola, I don't know which;

The **Court**: I do not think myself that this offer of proof, "there is no added ingredient" whether deleterious or not, is material at all, because it appears already by the stipulation what this is. It appears that it is a compound; that there is nothing to show that there is anything injurious except the boric acid, if that is injurious.

There is nothing in the stipulation to show what these other ingredients are, and in the absence of such fact appearing in the State's case, the People are not bound to prove that those ingredients are not injurious. They are presumed to be harmless.

The only way that any harmful ingredient came at all in the State's case was a stipulation that it contained boric acid, and the Statute says that boric acid is considered as harmful. That is the only way the State makes a case at all.

I do not believe that the offer to prove that the compound in question contains no added ingredient whatever, deleterious or otherwise, is material. It does not appear from the stipulation that it is, and therefore it is no part of the State's case—that there was any added ingredient.

Mr. **McKinley**: We are not proceeding on that theory.

The **Court**: The State does not base its case on that.

The stipulation in evidence, which, the defendant is bound to
meet, does not contain any such stipulation, and the offer of the
defendant therefore to prove that fact, it seems to me is not
26 material. It is not addressed to any issue, as I have ruled.

Mr. **Chandler**: Well then, your Honor, will sustain the objection to that part of the offer, and the defendant reserves an exception.

To which ruling of the Court, the defendant, by his counsel, then and there duly excepted.

The **Court**: As to the first part of the stipulation, that clause the offer to prove to which I referred a moment ago. I do not know whether the record shows that that part of the offer to prove is without objection of the State, or not.

Mr. **McKinley**: With the exception of what I pointed out, I have no objection to their offering testimony.

The **Court**: Then, it may be agreed that the witness present in court, if sworn and put upon the witness stand to testify, would testify that the Price Canning Compound is an article of commerce which has been sold under that distinct name for a period of years with the ingredients, and in the proportions contained in the sample taken by the Food Department, which is the subject of this suit; that it has acquired a wide reputation over a large number of States in the Union as a distinctive article, used for canning by the housewife.

Mr. **McKinley**: We have no objection.

The **Court**: Then, the record will show that the witness would so testify if sworn.

Mr. **Chandler**: And that the admission will have the same effect as if he had so testified.

The **Court**: I think that disposes of the first clause of the offer.

27 Mr. **Chandler**: Your Honor sustained the objection to the offer to show that it is not sold by us in any food, nor as a food, on the ground that it is covered by the stipulation?

The **Court**: That is covered by the stipulation.

Mr. **Chandler**: We will note an exception to preserve our record.

The **Court**: Oh, yes.

Mr. **Chandler**: Now then, we pass to the second offer, if your Honor please: That boric acid is not injurious to health or to the human system in any way, that when it is taken into the system, either clear or in foods of any kind, which it is preserving, it is in no way assimilated, but is thrown off with the excretions.

Mr. **McKinley**: To that we object. Paragraph 5 of Section VIII of the Pure Food Law declares that boric acid is unwholesome—declares boric acid to be unwholesome and injurious—and it is not the province of the Court to sit and determine matters of that kind, but the Court, from his own knowledge, determines from his experience whether or not it is so well known to be wholesome, as would justify the setting aside of the declaration of the Statute.

The **Court**: I think on the strength of the decision of Justice Harlan that I referred to, it is the province of the Legislature to dedetermine what articles are articles injurious to health, where there is any doubt about it.

If the Legislature should declare bread to be unwholesome, that would be a declaration so evidently erroneous and contrary to all human experience, that the Court would say that the Legislature had gone out of its province; but where an article is in the mind of the public—so far as settled by common experience—in a doubtful class, and much more so if it is clearly injurious, it is the 28 province of the Legislature, as I understand it, from the decisions, to determine whether it shall be considered injurious or not. It is not the province of the Court in its determination to interfere with the determination of the Legislature.

I do not think that the offer here is such an offer as would meet the situation set out by the facts in this case, and by the action taken by the Legislature in the matter, and I doubt very much whether it is competent in any event, or material.

I do not know that I could say anything in addition to what has been already said about the matter, and I feel, in view of the fact that this case will probably be submitted to the Supreme Court, that I would rather have them pass upon that.

I do not see myself how it can be material to show that under the Statute in this case which declares that boric acid shall be considered as a deleterious or injurious article to health—I do not see how it can be material or assist the Court in any way to arrive at any other conclusion, to show that boric acid is not injurious to health or to the human system in any way, or that when it is taken into the system, either clear or in foods of any kind, which it is preserving, it is in no way assimilated, but is thrown off with the excretions.

I know from my own experience that strychnine when it goes into the system, is thrown off. In fact, I have used strychnine. Strychnine is a tonic. I took it for a long time myself as a tonic. Take it in small quantities, it is thrown off, and it is eliminated in the system by the same process which is in progress here. Whether boric acid would be eliminated from the system, would depend on how much a man took. If he took only a small portion, even if it is rank
poison, I have no doubt the system would take care of it; but,
29 if it is taken in larger quantities, and continuously for a long
period of time, as a daily article of food, the system might
not throw it off. Of course it might be poison.

I think in the form the offer is made I will sustain the objection.

Mr. Chandler: Very well, we will note an exception. We now offer to show that Price Canning Compound, mentioned in the statement of claim of the State, is an article of commerce sold in Illinois, in the original package, manufactured and made in Minnesota—manufactured and made in Minnesota.

The Court: Any objection to that?

Mr. McKinley: We will admit that the witness will so testify.

The Court: Very well, the record will show that the witness if placed on the witness stand, sworn and examined will testify that the Price Canning Compound mentioned in the statement of claim, is an article of commerce sold in Illinois, in the original package manufactured and made in Minnesota, with the same force and effect as though the witness himself were testifying in the case.

Mr. Chandler: We now offer to show that Price Canning Compound is not adulterated or mis-branded in any way.

Mr. McKinley: The People will object to that on the ground that it is a mere conclusion, and it is not an offer of substantative proof.

The Court: That was the fourth?

Mr. McKinley: Will you just read the offer, Mr. Reporter?

(Offer read.)

Mr. McKinley: It was not competent to show that it was not
adulterated or mis-branded; it is for the Court and Jury to
30 determine that, it is not an issue in the case.

The Court: I do not think it is an issue in the case.

Mr. McKinley: No, it is not; that is a separate issue under Section XXII.

The Court: There is no averment or claim that it is adulterated or mis-branded; I will sustain the objection on the ground that it is not. The offer of proof is not addressed to any issue in the case.

Mr. Chandler: To that we except.

Mr. McKinley: You will also sustain our objection, or do you think that is well taken?

The Court: I really supposed the only question was whether the ruling of the Court is correct, not whether the Court is correct now. Objection sustained.

Mr. Chandler: I will note an exception.

Now, your Honor, Mr. Hayes is the attorney of record for this defendant, and I ask that Tolman & Redfield by Mr. Chandler, be associated with him in this case, in order that the record may be clear.

Mr. McKinley: No objection to that.

Mr. Chandler: Then, there will be an order entered adding Tolman & Redfield, by Mr. Chandler, as associate counsel with Mr. Hayes, will there? I think that would be advisable.

The Court: Well, if you want your record to show that all right.

Mr. Chandler: I will prepare a draft later.

The Court: I supposed that merely all you had to do was to enter your appearance.

Mr. McKinley: They are of record (reading) "Tolman & Redfield and Howard W. Hayes, attorneys of record."

Mr. Chandler: Well then, that is all right.

31 If your Honor please, the defendant rests at this point, and would like to make a motion that the Court dismiss the complaint and find the issues in favor of the defendant. We will not argue it.

The Court: Yes, it takes in the same points heard before.

Mr. Chandler: Yes.

The Court: Motion overruled, and exception. The fine——

Mr. Chandler: If your Honor please, just a minute, before your Honor makes a finding in this case here; we would like to offer certain propositions of law that we have just prepared. I will hand copies to opposing counsel. These, we think cover some points that have been already argued, Mr. McKinley.

I might suggest that if your Honor would like to take it under advisement rather than pass on it this morning——

The Court: I might do that. I might pass on them Saturday morning. What is the fixed penalty provided by the Statute?

Mr. McKinley: Fifteen to one hundred dollars.

The Court: I suppose the parties want to know what the ruling of the Court is on the matter of penalty if they are going away.

I think in this case the penalty of $50.00 would be about the right thing, and when the time comes, if we reach the point when a penalty is imposed by the Court, that will be the amount.

These propositions of law I will consider and pass on Saturday; we will complete the record at that time.

Mr. Chandler: Saturday morning?

The Court: Yes, Saturday morning. Here is your memorandum of offers to prove (handing memorandum to counsel).

32 Mr. Jayne: May I ask the Court, in case of appeal, what the amount of the bond would be? So we could arrange for it?

Mr. Chandler: About two hundred and fifty dollars——

The COURT: The amount, according to the penalty, would be one hundred dollars; that will cover the costs, and the penalty.

Are there any other matters on that, Mr. McKinley, that occur to you?

Mr. MCKINLEY: You mean in meeting these propositions of law?

The COURT: No, in the opinion.

Mr. MCKINLEY: Oh, no.

(Whereupon an adjournment was taken to tomorrow Wednesday, July 31st, A. D. 1912, and this cause continued until Saturday August 3rd, A. D. 1912, at 9.30 o'clock A. M.)

The above and foregoing was all the evidence heard, adduced or considered in the trial of the above entitled cause.

Thereafter, on, to-wit, Saturday August 3, A. D. 1912, the following proceedings were had in the above entitled cause:

The Court refused to hold each and all of the propositions of law submitted by counsel for the defendant, as aforesaid, at the hearing on July 30, A. D. 1913, to which action of the Court in refusing to hold said propositions of law, and each and all of the same, the defendant by his counsel then and there duly excepted.

Said propositions of law so refused by the Court were in words and figures as follows, to-wit:

The Court holds as a matter of law that Section 22 of an act entitled:

33 "An act to prevent fraud in the sale of dairy products, their imitation or substitutes, to prohibit and prevent the manufacture and sale of unhealthful, adulterated or misbranded food, liquors, or dairy products, to provide for the appointment of a State Food Commissioner and his assistants, to define their powers and duties, and to repeal all acts relating to the production, manufacture and sale of dairy and food products and liquors in conflict herewith,"

is unconstitutional and null and void in that the same is in conflict with Section 13 of Article 4 of the Constitution of the State of Illinois which provides that

"No Act hereafter passed shall embrace more than one subject and that shall be expressed in the title."

Marked, "Refused. Objected to and exception, by defendant.
FREEMAN K. BLAKE."

The Court holds as a matter of law that if the Act entitled:

"An act to prevent fraud in the sale of dairy products, their imitation or substitutes, to prohibit and prevent the manufacture and sale of unhealthful, adulterated or misbranded food, liquors or dairy products, to provide for the appointment of a State Food Commissioner and his assistants, to define their powers and duties and to repeal all acts relating to the production, manufacture and sale of dairy and food products and liquors in conflict herewith."

is construed to prohibit the sale in original packages in the State of Illinois of Mrs. Price's Canning Compound, a preservative, and if in fact said Mrs. Price's Canning Compound is an article of commerce produced in the State of Minnesota and offered for sale in the State of Illinois in original packages and, if furthermore said Mrs. Price's Canning Compound is not in fact unwholesome or injurious, said Act is unconstitutional and null and void in that it is contrary to the 3rd subdivision of Section 8 of Article 1 of the Constitution
34 of the United States which confers upon the Congress of the United States the power to regulate commerce among the several States, and is also contrary to section 1 of the 14th Amendment to the Constitution of the United States which provides that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

(Marked "Refused. Objected to and exception by defendant.)

FREEMAN K. BLAKE.

The Court holds as a matter of law that the Act entitled:

"An Act to prevent fraud in the sale of dairy products, their imitation or substitutes, to prohibit and prevent the manufacture and sale of unhealthful, adulterated or misbranded food, liquors or dairy products, to provide for the appointment of a State Food Commissioner and his assistants, to define their powers and duties and to repeal all acts relating to the production, manufacture and sale of dairy and food products and liquors in conflict herewith,"

should not be construed to prohibit, and does not prohibit the sale within the State of Illinois in original packages of Mrs. Price's Canning Compound, a preservative, if the same is in fact an article of commerce produced in Minnesota and offered for sale in original packages in the State of Illinois, and if furthermore said Mrs. Price's Canning Compound is not in fact unwholesome or injurious.

(Marked, "Refused, Objected to and exception by defendant.)

FREEMAN K. BLAKE.

The Court holds as a matter of law that if Section 22 of an Act entitled:

35 "An Act to prevent fraud in the sale of dairy products, their imitation or substitutes, to prohibit and prevent the manufacture and sale of unhealthful, adulterated or misbranded food, liquors or dairy products, to provide for the appointment of a State Food Commissioner and his assistants, to define their powers and duties and to repeal all acts relating to the production, manufacture and sale of dairy and food products and liquors in conflict herewith",

is construed to prohibit the use of any preservative containing boric acid which in the 5th subdivision of Section 8 of said Act is declared unwholesome and injurious, and if in fact such boric acid in the proportion contained in such preservative is not unwholesome or injurious, said section of said act is unconstitutional and null and void, in that it is contrary to section 2 of article 2 of the Constitution of the State of Illinois, which provides that

"No person shall be deprived of life, liberty or property without due process of law",

and is also contrary to section 1 of the 14th amendment of the Constitution of the United States which provides that

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws."

(Marked, "Refused, Objected to and exception by defendant.")

FREEMAN K. BLAKE, *Judge*.

The Court holds as a matter of law that the Act entitled:

"An Act to prevent fraud in the sale of dairy products, their imitation or substitutes, to prohibit and prevent the manufacture and sale of unhealthful, adulterated or misbranded food, liquors or dairy products, to provide for the appointment of a State Food Commissioner and his assistants, to define their powers and duties and to repeal all acts relating to the production, manufacture and sale of dairy and food products and liquors in conflict herewith,"

does not prohibit the use of a preservative containing boric acid unless such preservative is in fact unwholesome or
36 injurious.

(Marked, "Refused, Objected to and exception by defendant.)

FREEMAN K. BLAKE, *Judge*."

The Court holds as a matter of law that if an Act entitled:

"An Act to prevent fraud in the sale of dairy products, their imitation or substitutes, to prohibit and prevent the manufacture and sale of unhealthful, adulterated or misbranded food, liquors or dairy products, to provide for the appointment of a State Food Commissioner and his assistants, to define their powers and duties and to repeal all acts relating to the production, manufacture and sale of dairy and food products and liquors in conflict herewith,"

properly construed prohibits the sale of a preservative containing boric acid, and if in fact such preservative is not unwholesome or injurious, said Act is unconstitutional and null and void in that it is contrary to section 2 of article 2 of the Constitution of the State of Illinois, which provides that:

"No person shall be deprived of life, liberty or property without due process of law,"

and is also contrary to section 1 of the 14th Amendment of the Constitution of the United States which provides that:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws."

(Marked, "Refused, Objected to and exception by defendant.)
FREEMAN K. BLAKE, *Judge.*"

The Court holds as a matter of law that the evidence herein does not show the Commission by the defendant of any offense against the laws of the State of Illinois or more particularly
37 against an Act entitled:

"An Act to prevent fraud in the sale of dairy products, their imitation or substitutes, to prohibit and prevent the manufacture and sale of unhealthful, adulterated or misbranded food, liquors or dairy products, to provide for the appointment of a State Food Commissioner and his assistants, to define their powers and duties and to repeal all acts relating to the production, manufacture and sale of dairy and food products and liquors in conflict herewith."

(Marked, "Refused, Objected to and exception by Defendant.")
FREEMAN K. BLAKE, *Judge.*"

Thereupon the Court found the defendant guilty and assessed the defendant's fine at the sum of Fifty Dollars.

Thereupon the defendant, by his counsel, moved the Court to grant a new trial, which motion the Court, after hearing arguments of counsel, then and there overruled; to which action of the Court in overruling said motion for a new trial, the defendant then and there duly excepted.

Thereupon the defendant moved the Court in arrest of judgment; which motion was overruled by the Court; to which action of the Court in overruling said motion, the defendant, by his counsel, then and there duly excepted.

Thereupon the Court entered judgment on the finding, and adjudged the defendant guilty, and ordered that he be fined Fifty Dollars, and the costs of suit; to which order and judgment of the Court, the defendant by his counsel, then and there duly excepted.

Forasmuch therefore, as the matters and things aforesaid and above set forth, do not otherwise appear of record, the defendant tenders this his bill of exceptions, and prays that the same may be signed, sealed and approved by said Judge of the Municipal Court of Chicago, pursuant to the Statute in such case made and
38 provided; which is done accordingly, this fifth day of September A. D. 1912.

FREEMAN K. BLAKE,
Judge of the Municipal Court of Chicago.

O. K.
CHAS. F. McKINLEY,
Attorney for the People.

O. K.
TOLMAN AND REDFIELD,
Att'ys for the Def't.

Filed — the Municipal Court of Chicago, Sept. 5, 1912. Homer K. Galpin, Clerk.

39 *Certified Transcript of Record.*

State of Illinois,
County of Cook, ss:

I, Homer K. Galpin, Clerk of The Municipal Court of Chicago, in said County and State, and the keeper of the records and files thereof, in the City, County and State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record in a certain cause (except the bill of exceptions, the original of which is incorporated herein according to law), lately pending in said court, wherein The People of the State of Illinois — Plaintiff, and W. T. Price, Defendant.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at Chicago, aforesaid this 5th day of September, 1912.

[seal.] HOMER K. GALPIN, *Clerk.*

40 No. 8408.

In the Supreme Court of Illinois, October Term, A. D. 1912.

The People of the State of Illinois, Defendant in Error,
vs.
W. T. Price, Plaintiff in Error.

Writ of Error to the Municipal Court of Chicago.

Honorable Freeman K. Blake, Trial Judge.

Assignment of Errors.

Now comes W. T. Price, by Tolman and Redfield, his attorneys, and shows to the court that in the proceedings and judgment of the Municipal Court of Chicago there is manifest error in the following respects, to-wit:

First. The court erred in holding that the acts of the plaintiff in error herein shown by the evidence constituted an offense against the laws of the State of Illinois.

Second. The Court erred in failing to hold that if an act entitled, "An act to prevent fraud in the sale of dairy products their imitation or substitutes, to prohibit and prevent the manufacture and sale of unhealthful, adulterated or misbranded, food, liquors or dairy products, to provide for the appointment of a State Food Commissioner and his assistants, to define their powers and duties, and to repeal all acts relating to the production, manufacture and sale of dairy and food products and liquors in conflict herewith."

41 or any part thereof, prohibits the acts of the Plaintiff in error herein, as shown by the evidence, said act or such part thereof, is unconstitutional and null and void, in that the same is contrary to section 2 of article 2 of the constitution of the State of Illinois and is also contrary to the third division of section 8 of article 1 and section 1 of the 14th amendment of the Constitution of the United States.

Third. The Court erred in failing to hold, as a matter of law, that section 22 of said act is unconstitutional and null and void in that the same is in conflict with section 13 of article 4 of the Constitution of the State of Illinois.

Fourth. The court erred in refusing to dismiss the suit against the plaintiff in error herein and to hold the plaintiff in error not guilty.

Fifth. The court erred in refusing each and every of the propositions of law refused by the court.

Sixth. The court erred in finding the plaintiff in error guilty of a violation of the dairy and food law, being the law above mentioned, and in sentencing said plaintiff in error to pay a fine in the sum of $50 and costs of suit.

Seventh. The finding and judgment of the court are contrary to the evidence.

Eighth. The finding and judgment of the court are contrary to the law.

Ninth. The finding and judgment of the court are contrary to the law and the evidence.

Wherefore, for these and other manifest errors appearing upon the face of the record herein, plaintiff in error prays that the judgment of said Municipal Court may be reversed.

TOLMAN AND REDFIELD,
Attorneys for Plaintiff in Error.

42 Be it remembered, that to-wit, on the Fourteenth day of December, A. D. 1912, the same being one of the days of the term of Court aforesaid certain proceedings were had in said Court and entered of record in the words and figures following towit:

8408.

PEOPLE STATE OF ILLINOIS
VS.
W. T. PRICE.

Error Municipal Court of Chicago.

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that Plaintiff in Error hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said Defendant in error having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause having been argued orally by Trafford N. Jayne for plaintiff in error is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

43 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court Begun and Held at Springfield on Tuesday, the Fourth Day of February, in the Year of Our Lord One Thousand Nine Hundred and Thirteen, Within and for the State of Illinois.

Present:

The Honorable Frank K. Dunn, Chief Justice.
Honorable James H. Cartwright, Justice.
Honorable William M. Farmer, Justice.
Honorable Orrin N. Carter, Justice.
Honorable John P. Hand, Justice..
Honorable Alonzo K. Vickers, Justice.
Honorable George A. Cooke, Justice.
Patrick J. Lucey, Attorney General.
Warren C. Murray, Marshal.

Attest:
J. McCAN DAVIS, *Clerk.*

Be it remembered, that afterward, to-wit; on the 20th day of February, 1913, the opinion of the Court was filed in said cause and entered of record in the words and figures following to-wit:

No. 8408.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs.
W. T. PRICE, Plaintiff in Error.

Error to Municipal Court of Chicago.

44 Docket No. 8408—Agenda 27—December, 1912.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs.
W. T. PRICE, Plaintiff in Error.

Mr. Justice FARMER delivered the opinion of the court.

Plaintiff in error was fined $50 and costs in the municipal court of the City of Chicago for violating what is commonly known as the

Pure Food statute, enacted in 1907, and has sued out a writ of error to review the judgment.

The title of the act is, "An act to prevent fraud in the sale of dairy products, their imitation or substitutes, to prohibit and prevent the manufacture and sale of unhealthful, adulterated or misbranded food, liquors or dairy products, to provide for the appointment of a State food commissioner and his assistants, to define their powers and duties and to repeal all acts relating to the production, manufacture and sale of dairy and food products and liquors in conflict herewith." The charge against plaintiff in error was that he "did unlawfully manufacture for sale, offer for sale and sell, a certain preservative compound known as Mrs. Price's Canning Compound, intended as a preservative of food, which was then and there unwholesome and injurious in that it contained boric acid, an unwholesome and injurious substance, in violation of the act aforesaid." To the charge he pleaded not guilty and waived trial by jury.

On the trial certain facts were agreed to by stipulation between the parties, as follows: "That the defendant, W. T. Price, on or about August 30, 1911, at Chicago, in said county, offered for sale, and sold, two packages of a preservative known as Mrs. Price's Canning Compound; that said canning compound contained boric acid; that the label on said packages bears the following statement: 'It is not claimed for this compound that it contains anything of
45 food value, but it is an antiseptic preparation, and among its many uses may be employed to prevent canned fruits and vegetables from souring and spoiling; that said preservative was not offered for sale or sold in any food product, but was offered for sale and sold, separate and apart, as a preservative; that the defendant was accorded a hearing before the State Food Commission, pursuant to the provisions of the Food Law."

The State also introduced in evidence the envelope or covering used for inclosing the compound referred to in the stipulation. Printed on one side of the envelope was the following:

"Mrs. Price's Canning Compound,
Manufactured by
The Price Compound Company,
Minneapolis, Minn.

May be used in canning all kinds of fruit, and is especially valuable for corn, beans, peas, asparagus, tomatoes, etc.

May also be used in making catsup, sweet pickles, or anything that is liable to ferment. It saves money, time, labor, worry, and insures the best results. See book of directions for instruction in using the compound and how to do all kinds of canning.

Book with free samples sent to any address on application.

The contents of this package is sufficient for four quarts.

(Serial No. 7557. Guaranteed by the Price Compound Co. under the Food and Drug Act of June 30th, 1906.*)

For compound or information call on our agent or address
Mrs. W. T. Price, 1605 Penn avenue, North Minneapolis, Minn."

The other side of said envelope contains the following words and figures:

"Notice to Purchasers.

"It is not claimed for this compound that it contains anything of food value, but it is an antiseptic preparation, and among its many uses may be employed to prevent canned fruits and vegetables from souring and spoiling.

* * * * * * *

Retail Price

1 Package 10¢. 3 Packages 25¢. 7 Packages 50¢.
15 Packages $1.00."

No other evidence was offered by the State. Plaintiff in error at the conclusion of the State's case entered a motion that he be found not guilty, assigning as reasons therefor that the proof was not 46 sufficient to authorize a conviction and also that the act is unconstitutional. The court denied the motion, and plaintiff in error then offered to make certain proof. It was stipulated that a witness in court, if sworn, would testify that the Price Canning Compound is an article of commerce which has been sold under that distinct name for a period of years, with the ingredients and in the proportions contained in the sample taken by the food department which is the subject of this suit; that it has acquired a wide reputation over a large number of States in the Union as a distinctive article used for canning by the housewife; that it is not sold by the defendant in any food nor as a food, nor is it sold to manufacturers of food or canners of food for sale; that boric acid is a constituent part of the compound, and has been such during all the time that the compound has been sold; that in the sample taken by the food department, and, in fact, in any other goods sold by this defendant, there is no added ingredient of any kind whatever, whether it be injurious, deleterious or otherwise. He also offered to prove that boric acid is not injurious to the health or human system, and that the Price Canning Compound is not adulterated or mis-labeled in any way. Objections by the State to this proof were sustained. Plainiff in error also offered to prove, and it was agreed that a witness, if placed on the stand, would testify, that the compound is an article of commerce manufactured in Minnesota and sold in the original package in Illinois.

The Court denied propositions of law tendered by plaintiff in error raising the material questions involved in this litigation, which are thus stated in plaintiff in error's brief; "First, is the sale of a harmless preservative in the State of Illinois prohibited by the Dairy and Food law merely because it contains boric acid? Second, if such is the effect of the statute, is so much of it constitutional? Third, can the State of Illinois, in any event, prohibit the 47 sale of a preservative manufactured in another State and sold in this State in the original package?

The position of the State is, that by the Pure Food Act boric acid was declared unwholesome and injurious, and this obviated the necessity for proof of that fact. Section 8 provides that food shall be deemed to be adulterated "if it contains any added poisonous or other added deleterious ingredients which may render such articles injurious to health, * * * and formaldehyde, hydrofluoric acid, boric acid, salicylic acid and all compounds and derivatives thereof are hereby declared unwholesome and injurious." Section 22 forbids anyone to "manufacture for sale, advertise, offer or expose for sale, or sell, any * * * unwholesome or injurious preservatives or any mixture or compound thereof intended as a preservative of any food: Provided, however, that this section shall not apply to pure salt added to butter and cheese."

We will first notice the objection of plaintiff in error that section 8 deals only with foods; that the declaration in that section that boric acid is injurious and unwholesome is limited to foods containing that substance as an added ingredient, and has no application to a preservative which is not, and does not purport to be a food.

Both sections 8 and 22 are parts of one act, and the act as a whole, should be so construed as to give effect to its manifest purpose and intent. Its main purpose is to protect health by preventing adulteration of food by any unwholesome and injurious ingredient. Boric acid is declared to be unwholesome and injurious, and the sale of any food to which it is an added ingredient is prohibited. It was well known to the legislature that various compounds are manufactured and sold for preserving foods of different kinds. If
48 such preservatives contain unwholesome and injurious ingredients, their use by the housewife, or anyone else, in preserving fruits or food, would be as injurious to the health as if they had been added by a dealer or manufacturer to fruits or other foods before placing them on the market. The object of the act is to protect the public health by preventing dealers from selling food to which had been added, for the purpose of preserving it, ingredients injurious to the health, or from selling any compound as a preservative which contained any such ingredients. The prohibition is not against the sale of all preservatives, but is against only unwholesome or injurious preservatives. It is a primary rule in the interpretation and construction of a statute that the intention of the legislature is to be ascertained and given effect. In ascertaining the legislative intent each part or section is to be considered in connection with every other part or section, also the evils intended to be remedied by the enactment. "The intent is the vital part,—the essence of the law,—and the primary rule of construction is to ascertain and give effect to that intent." (Lewis' Sutherland on Stat. Construction, sec. 363.) If a statute is susceptible of more than one construction it should be given the construction that will effect its purpose rather than one that will defeat it. (People v. Hinrichsen, 161 Ill., 223.) It is just as important to prohibit the sale to the housewife of a compound containing boric acid, to be used by her to preserve fruits and vegetables put up by her for family use, as it is to prohibit the sale of fruits and vegetables after such an ingredient has been added. We think the reasonable construction of the act to be that the pro-

hibition against boric acid is not limited to foods to which it is an added ingredient, but extends to compounds sold as a food preservative which contain boric acid. The danger to health is as great from one as the other, and the prohibition of both was necessary to effect the evident purpose of the legislature.

49 It is also contended that boric acid is not, in fact, unwholesome and injurious; that the court erred in refusing to hear evidence upon that question, and if the declaration that boric acid is unwholesome and injurious obviates the necessity for proof of that fact, it violates section 2 of article 2 of our State constitution and the provision of the fourteenth amendment to the constitution of the United States, to the effect that no person shall be deprived of liberty or property without due process of law. Plaintiff in error quotes from scientific authorities that boric acid, in proper quantities, is harmless and an effective antiseptic and preservative. Defendant in error cites and quotes from a publication giving the results of an extensive scientific investigation made by the National Bureau of Chemistry under authority given by Congress, of the effect of boric acid on the human system, in which publication it is stated the effect was found to be injurious. It may be conceded the legislature has no authority to forbid the sale of a known wholesome article of food, but it — certain boric acid is not so universally conceded or known to be wholesome that judicial notice will be taken of it. Whether it is or not is a matter of dispute. In such cases, in enacting legislation in the exercise of the police power of the State, the legislative declaration that it is unwholesome must be accepted by the courts, and they will not investigate the facts for the purpose of determining whether the declaration of the legislature was warranted by the facts. (Powell v. Pennsylvania, 127 U. S. 678; State v. Layton, 160 Mo. 474; 83 Am. St. Rep. 487; Adams v. Milwaukee, 144 Wis. 371; Sanders vs. Commonwealth, 117 Ky. 1; 111 Am. St. Rep. 219; People v. Cipperly, 101 N. Y. 634; 4 N. E. Rep. 107; State of Iowa v. Schlenker, 112 Iowa, 642; 51 L. R. A. 347.) The same principle has been declared by this court in cases involving the right of a legislative body, State or
50 municipal, to declare a thing a nuisance. (Laugel v. City
of Bushnell, 197 Ill. 20.) If the act before us is, as we hold it to be, a valid exercise of the police power, the answer to the contention of plaintiff in error that it is in violation of the provisions of the State and Federal constitutions above referred to will be found in the cases above cited.

It is also contended that if the act is construed as we have construed it,—to prohibit the sale of a food preservative containing boric acid—it is in violation of section 13 of article 4 of our State constitution, in that it embraces a subject not expressed in the title. It is argued that by the title the act is limited to dairy products, food and liquors, and that any prohibition against preservatives is beyond the scope of the title. We do not agree with this contention. If, as we have above endeavored to show, the prohibition against the sale of unwholesome and injurious preservatives is so material a part of the act and so necessary to make effective the manifest purpose of the enactment, it requires no unwarranted stretch to hold that the title is broad enough to include the sale of unwholesome preservatives. The constitutional provision said to be violated is to be liberally interpreted in aid of the act. (Town of Manchester v. People, 178 Ill. 285.) "The fact that many things of a diverse nature are authorized or required to be done is unimportant, provided the doing of them may fairly be regarded as in fu-therance of the general subject of the enactment." McGurn v. Board of Education, 133 Ill. 122.

It is further contended that if the act under consideration be construed as we have construed it—to prohibit the sale of Price's compound,—it is an infringement upon the power of Congress, to which body is delegated, by the constitution, the power to regulate commerce among the several States. The power of a State to prohibit within its borders the sale of adulterated food is not repugnant to the commerce clause of the Federal constitution but
51 is a valid exercise of the police power of the State. Plumley
v. Massachusetts, 155 U. S. 461; Schollenberger v. Pennsylvania, 171 id. 1; Crossman v. Lurman, 192 id. 189.

Neither was plaintiff in error protected, in the sale of the preservative, under the doctrine of the original package decisions of the Supreme Court of the United States. Austin v. Tennessee, 179 U. S. 342.

We are of the opinion the municipal court did not err in the judgment rendered, and that judgment is affirmed.

Judgment Affirmed.

52 UNITED STATES OF AMERICA,
State of Illinois, ss:

At a Term of the Supreme Court, Begun and held at Springfield on Tuesday, the Fourth day of February, in the year of our Lord One Thousand Nine Hundred and Thirteen, within and for the State of Illinois.

Present:

The Honorable Frank K. Dunn, Chief Justice.
Honorable James H. Cartwright, Justice.
Honorable William M. Farmer, Justice.
Honorable Orrin N. Carter, Justice.
Honorable John P. Hand, Justice.
Honorable Alonzo K. Vickers, Justice.
Honorable George A. Cooke, Justice.
Patrick J. Lucey, Attorney General.
Warren C. Murray, Marshal.

Attest:
J. McCAN DAVIS, *Clerk.*

Be it Remembered, that to-wit:—on the 20th day of February, A. D. 1913, the same being one of the days of the said February term of said Supreme Court, certain proceedings were had in said court and entered of record in the words and figures following, to-wit:

No. 8408.

PEOPLE STATE OF ILLINOIS, Defendant in Error,
v.
W. T. PRICE, Plaintiff in Error.

Appeal from Error to Municipal Court of Chicago.

FEBRUARY 20th, A. D. 1913.

And now on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for Error, and now being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the Judgment aforesaid, is there anything erroneous, vicious or defective, and that in that record there is no error:

Therefore, it is considered by the Court that the Judgment of the Municipal Court aforesaid be Affirmed in all things, and stand in full force and effect, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said Defendant in Error recover of and from the said Plaintiff in Error costs by it in this behalf expended, to be taxed, and that it have execution therefor.

53 At a Supreme Court, Begun and held at Springfield on Tuesday, the First day of April, in the year of our Lord One Thousand Nine Hundred and thirteen, within and for the State of Illinois.

Present:

The Honorable Frank K. Dunn, Chief Justice.
Honorable James H. Cartwright, Justice.
Honorable William M. Farmer, Justice.
Honorable Orrin N. Carter, Justice.
Honorable John P. Hand, Justice.
Honorable Alonzo K. Vickers, Justice.
Honorable George A. Cooke, Justice.
Patrick J. Lucey, Attorney General.
Warren C. Murray, Marshal.

Attest:
J. McCAN DAVIS, *Clerk*.

Be it Remembered, that to-wit, on the Second day of April, A. D. 1913, the same being one of the days of the said April term of Court, certain proceedings were had in said Court and entered of record in the words and figures following, to-wit:

No. 8408.

PEOPLE STATE OF ILLINOIS, Defendant in Error,
vs.
W. T. PRICE, Plaintiff in Error.

Error Municipal Court of Chicago.

Now on this day the Court having duly considered the petition for rehearing filed herein and the Court being now advised in the premises doth overrule the prayer of the petition and denies a rehearing of this cause.

54 *Authentication of Record.*

SUPREME COURT,
State of Illinois, ss:

I, J. McCan Davis, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of W. T. Price, Plaintiff in Error, vs. The People of the State of Illinois, Defendant in Error, and also of the opinion of the Court rendered therein as the same now appears on file in my office.

In Testimony whereof I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, in said State this 24th day of July, A. D. 1913.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court.

55 Be it Remembered, to-wit, that on the 21st day of June, A. D. 1913, there was duly filed by the plaintiff in error, W. T. Price, in the office of the Clerk of the Supreme Court of Illinois a petition for writ of error with assignments of error from the Supreme Court of the United States to the Supreme Court of Illinois, addressed to the Hon. George A. Cooke, Chief Justice of the Supreme Court of Illinois, with the original order by the said Chief Justice upon the said petition allowing said writ of error which original document is in words and figures following, to-wit:

56 In the Supreme Court of Illinois.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs.
W. T. PRICE, Plaintiff in Error.

Petition for Writ of Error, Assignments, and Prayer.

Considering himself aggrieved by the Final Decision of the Supreme Court of the State of Illinois in rendering Judgment against him in the above entitled case, the plaintiff in Error hereby prays a Writ of Error from the said Decision and Judgment to the United States Supreme Court, and an Order fixing the amount of Supersedeas Bond;

And said Price assigns the following Errors in the records and proceedings of the said case.

The Supreme Court of Illinois erred in holding and deciding that Sections 8 and 22 of Chapter 127-B, Hurd's Revised Statutes of the State of Illinois, were valid. The validity of said Sections was denied and questioned by the Defendant on the ground of their being repugnant to the Constitution of the United States, and in contravention thereof.

The said Errors are more particularly set forth as follows:

The Supreme Court of Illinois erred in holding and deciding:

1st. That said Sections 8 and 22 did not abridge the privileges and immunities of citizens or of the Plaintiff in Error as guaranteed by the 14th Amendment to the Federal Constitution.

2nd. That although said Sections were construed to prohibit the sale in original packages in Illinois of a Preservative, and although it were the fact that said Preservative was produced in the State of Minnesota and offered for sale in Illinois in original packages,
said Sections, or either of them, were not unconstitutional
57 and void as being contrary to the 3rd Subdivision of Section
8 of Article 1 of the Constitution of the United States, and also as being contrary to Section 1 of the 14th Amendment to the Constitution of the United States.

For which Errors the Defendant and Plaintiff in Error, W. T. Price, prays that the said Judgment of the Supreme Court of the State of Illinois, dated February 20, 1913, be reversed, and a judgment rendered in favor of Defendant and Plaintiff in Error and for costs.

TOLMAN AND REDFIELD AND
TRAFFORD N. JAYNE,
Attorneys for Defendant.

STATE OF ILLINOIS,
Supreme Court, ss:

Let the Writ of Error issue upon the execution of a Bond by said Defendant W. T. Price to the People of the State of Illinois in the sum of Five Hundred (500) Dollars, such Bond, when approved, to act as a Supersedeas.

Dated June 10th, 1913.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

GEO. A. COOKE,
Chief Justice Supreme Court of Illinois.

[Endorsed:] Filed Jun- 21, 1913. J. McCan Davis, Clerk of Supreme Court.

58 Be it remembered that on the 25th day of June, A. D. 1913, there was duly filed in the office of the Clerk of the Supreme Court of Illinois by W. T. Price, plaintiff in error, an original bond for writ of error from the Supreme Court of the United States to the Supreme Court of Illinois in words and figures as follows, to-wit:

59 In the Supreme Court of Illinois.

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,
vs.
W. T. PRICE, Plaintiff in Error,

Bond.

Know all men by these presents that We, W. T. Price as Principal and United States Fidelity and Guaranty Company, a corporation of Maryland, as Surety, are held and firmly bound unto the People of the State of Illinois in the sum of Five Hundred and no/100 dollars ($500.00) to be paid to the said People of the State of Illinois, to which payment well and truly to be made we bind ourselves jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18th day of June A. D. 1913.

Whereas, the above named Plaintiff in Error seeks to prosecute his writ of error to the United States Supreme Court to reverse the decision and judgment rendered in the above entitled action by the Supreme Court of the State of Illinois.

Now therefore the condition of this obligation is such that if the above named Plaintiff in error shall prosecute his said writ of error to effect and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then the obligation to be void, otherwise to remain in full force and effect.

W. T. PRICE. [SEAL.]
UNITED STATES FIDELITY AND
GUARANTY COMPANY,
By GORDON H. FOX, [SEAL.]
Attorney in Fact.

In presence of
TRAFFORD JAYNE,
MAUDE B. HASLIP,
As to Price.

60 STATE OF MINNESOTA,
County of Hennepin, ss:

On this 18th day of June, A. D. 1913, before me a Notary Public in and for said Hennepin County, personally appeared W. T. Price, to me known to be the person who executed the foregoing Bond, and he acknowledged the same as his free act and deed.

TRAFFORD JAYNE,
Notary Public, Hennepin County, Minn.

My Commission expires Jan'y 3, 1920.

Bond approved and to operate as a Supersedeas. Dated June 26th 1913.

GEORGE A. COOKE,
Chief Justice Supreme Court of Illinois.

STATE OF ILLINOIS,
County of Cook, ss:

I, Fred Boyer, a Notary Public in and for the County and State aforesaid, do hereby certify that Gordon H. Fox Attorney in Fact of the United States Fidelity and Guaranty Company, who is personally known to me to be the same person whose name is subscribed in the foregoing instrument, as such Attorney-in-fact, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act, and as the free and voluntary act of the said the United States Fidelity and Guaranty Company for the uses and purposes therein set forth and cause the corporate seal of said Company to be thereto attached.

Given under my hand and Notarial Seal this 18th day of June A. D. 1913.

[SEAL.]

FRED BOYER,
Notary Public.

61 15982.

Certified Copy.

Power of Attorney.

Know all Men by these Presents:

That the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, and having its principal office at the City of Baltimore, in the State of Maryland, does hereby constitute and appoint George E. Brennan, Thomas W. Thompson, Frank J. Gaulter, Leo K. Solomon, John H. McGibbons, Henry M. Marshall, and Gordon H. Fox, of the City of Chicago, State of Illinois, its true and lawful attorneys in and for the State of Illinois, jointly and severally, for the following purposes, to wit:

To sign its name as surety to, and to execute, seal and acknowledge any and all bonds, and to respectively do and perform any and all acts and things set forth in the resolution of the Board of Directors of the said United States Fidelity and Guaranty Company, a certified copy of which is hereto annexed and made a part of this Power of Attorney; and the said United States Fidelity and Guaranty Company, through us, its Board of Directors, hereby ratifies and confirms all and whatsoever any one of the said George E. Brennan and the said Thomas W. Thompson and the said Frank J. Gaulter and the said Leo K. Solomon and the said John H. McGibbons and the said Henry M. Marshall and the said Gordon H. Fox may lawfully do in the premises by virtue of these presents.

In Witness Whereof, the said United States Fidelity and Guaranty Company has caused this instrument to be sealed with its corporate seal, duly attested by the signatures of its Vice-President and Assistant Secretary, this 5th day of February, A. D. 1913.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
(Sig.) By CHAS. O. SCULL,
[SEAL.] *Vice-President.*
(Sig.) WM. T. MORGAN,
Assistant Secretary.

STATE OF MARYLAND,
Baltimore City, ss:

On this 5th day of February, A. D. 1913, before me personally came Chas. O. Scull, Vice-President of the United States Fidelity and Guaranty Company, and Wm. T. Morgan, Assistant Secretary of said Company, with both of whom I am personally acquainted, who being by me severally duly sworn, said that they resided in the City of Baltimore, Maryland, that they, the said Chas. O. Scull and Wm. T. Morgan, were respectively the Vice-President and Assistant Secretary of the said United States Fidelity and Guaranty Company, the corporation described in and which executed the foregoing Power of Attorney; that they each knew the seal of said corporation; that the seal affixed to said Power of Attorney was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that they signed their names thereto by like order as Vice-President and Assistant Secretary, respectively, of said Company.

My commission expires the first Monday in May, A. D. 1914.

[SEAL.] (Sig.) WILLIAM J. McFEELY, JR.,
Notary Public.

STATE OF MARYLAND,
Baltimore City, sct:

I, Stephen C. Little, Clerk of the Superior Court of Baltimore City, which Court is a Court of Record, and has a seal, do hereby certify that William J. McFeely, Jr., Esquire, before whom the annexed affidavits were made, and who has thereto subscribed his name, was, at the time of so doing, a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments, or proof of deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said Notary, and verily believe the signature to be his genuine signature.

In Testimony Whereof, I hereto set my hand and affix the seal of the Superior Court of Baltimore City, the same being a Court of Record, this 5th day of February, A. D. 1913.

[SEAL.] (Sig.) STEPHEN C. LITTLE,
Clerk of the Superior Court of Baltimore City.

Copy of Resolution.

That Whereas, it is necessary for the effectual transaction of business that this Company appoint agents and attorneys with power and authority to act for it and in its name in States other than Maryland, and in the Territories of the United States and in the Provinces of the Dominion of Canada and in the Colony of Newfoundland.

Therefore, be it Resolved, that this Company do, and it hereby does, authorize and empower its President or either of its Vice-Presidents in conjunction with its Secretary or one of its Assistant Secretaries, under its corporate seal, to appoint any person or persons as attorney or attorneys-in-fact, or agent or agents of said Company, in its name and as its act, to execute and deliver any and all contracts guaranteeing the fidelity of persons holding positions of public or private trust, guaranteeing the performance of contracts other than insurance policies and executing or guaranteeing bonds and undertakings, required or permitted in all actions or proceedings, or by law allowed, and

Also in its name and as its attorney or attorneys-in-fact, or agent or agents to execute and guarantee the conditions of any and all bonds, recognizances, obligations, stipulations, undertakings or anything in the nature of either of the same, which are or may by law, municipal or otherwise, or by any Statute of the United States or of any State or Territory of the United States or of the Provinces of the Dominion of Canada or of the Colony of Newfoundland or by the rules, regulations, orders, customs, practice or discretion of any board, body, organization, office or officer, local, municipal or otherwise, be allowed, required or permitted to be executed, made, taken, given, tendered, accepted, filed or recorded, for the security or protection of, by or for any person or persons, corporation, body, office, interest, municipality or other association or organization whatsoever, in any and all capacities whatsoever, conditioned for the doing or not doing of anything or on any conditions which may be provided for in any such bond, recognizance, obligation, stipulation, or undertaking or anything in the nature of either of the same.

I, Wm. T. Morgan, Assistant Secretary of the United States Fidelity and Guaranty Company, hereby certify that at a regular meeting of the Board of Directors of said Company, duly called and held at the office of the Company, at the City of Baltimore, on the 11th day of July, A. D. 1910, at which was present a quorum of said Directors, duly authorized to act in the premises, resolutions were passed and entered on the minutes of said Company, of which resolution the foregoing is a true copy and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and the seal of the United States Fidelity and Guaranty Company, this 5th day of February, A. D. 1913.

[SEAL.] (Sig.) WM. T. MORGAN,
Assistant Secretary.

I, Wm. T. Morgan, Assistant Secretary of the United States Fidelity and Guaranty Company, do hereby certify that the above and foregoing is a full, true and correct copy of the original power of attorney given by said Company to George E. Brennan, Thomas W. Thompson, Frank J. Gaulter, Leo K. Solomon, John H. McGibbons, Henry M. Marshall and Gordon H. Fox, of Chicago, Illinois, authorizing and empowering them to sign bonds as therein set forth.

Given under my hand and the seal of said Company, at Baltimore, Maryland, this 15th day of February, A. D. 1913.

[Seal United States Fidelity and Guaranty Company.
Incorporated 1896.]

WM. T. MORGAN,
Assistant Secretary.

[Endorsed:] Certified Copy. 15982. General Power of Attorney from United States Fidelity and Guaranty Company to Geo. E. Brennan, Manager, Chicago, Ill. Filed Jun- 25 1913. J. McCan Davis, Clerk of Supreme Court.

62 Be It Remembered that afterwards to-wit on the 14th day of July A. D. 1913, a certain Original writ of error was filed in the office of the Clerk of the Supreme Court in words and figures following, to-wit:

63 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of Illinois and W. T. Price, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the Unted States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened, to the great damage of the said W. T. Price, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings afore-

64 said, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 14th day of July in the year of our Lord one thousand nine hundred and thirteen.

[Seal of the District Court United States, Southern District Illinois.]

R. L. BROWN, *Clerk.*

Allowed:

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

GEO. A. COOKE,
Chief Justice Supreme Court of Illinois.

Filed Jul- 14, 1913. J. McCan Davis, Clerk of Supreme Court.

[Endorsed:] Filed Jul- 14, 1913. J. McCan Davis, Clerk of Supreme Court.

65 *Certificate of Lodgment.*

SUPREME COURT,
State of Illinois, ss:

I, J. McCan Davis, Clerk of the Supreme Court, do hereby certify that there was lodged with me as such Clerk on the 25th day of June, A. D. 1913, in the matter of W. T. Price, Plaintiff in Error, vs. The People of the State of Illinois, Defendant in Error,

1. The original bond of which a copy is herein set forth.

And afterwards, to-wit, on the 14th day of July, A. D. 1913, a copy of the writ of error was filed in the office of the Clerk of the Supreme Court together with copy for defendant in error.

In Testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield, Illinois, this 24th day of July, A. D. 1913.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court.

66 Be it remembered that to-wit on the 18th day of July A. D. 1913, a certain Citation was filed in the office of the Clerk of the Supreme Court in words and figures following, to-wit:

67 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the People of the State of Illinois, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Illinois, wherein W. T. Price is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Illinois, this 15 day of July 1913.

GEO. A. COOKE,
Chief Justice Supreme Court of Illinois.

Attest:

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court of Illinois.

Filed Jul- 18, 1913. J. McCan Davis, Clerk of Supreme Court.

I hereby accept service of the foregoing citation waiver- any other service of the same this 18th day of July, 1913.

P. J. LUCEY,
Attorney General of the State of Illinois.

68 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Illinois, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Illinois, in the City of Springfield, this 24th day of July, A. D. 1913.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court of Illinois.

Endorsed on cover: File No. 23,895. Illinois Supreme Court. Term No. 274. W. T. Price, plaintiff in error, vs. The People of the State of Illinois. Filed October 13th, 1913. File No. 23,895.

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 274.

W. T. PRICE,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This is a writ of error to review a judgment of the Municipal Court of Chicago rendered in an action therein pending in debt, and for a fine for violation of the Illinois Dairy and Food Law, Chapter 127-B. Hurd's Revised Statutes, said judgment being that the defendant was guilty of a violation of said Food Law, and that he be fined in the sum of $50 and the costs of suit.

The complaint of the state is as follows:

> "Plaintiff's claim is for a fine of $100, as provided for a first offense, for a violation of the 'Dairy and Food Law' (Chapter 127-B, Hurd's Revised Statutes.)
>
> It is the contention of the plaintiff that the defendant, Price, on, to-wit, August 30, 1911, at Chicago, in the said county, did unlawfully manufacture for sale,

> offer for sale and sell, a certain preservative compound known as Mrs. Price's Canning Compound, intended as a preservative of food, which was then and there unwholesome and injurious in that it contained boric acid, an unwholesome and injurious substance, in violation of the act aforesaid."

A jury was expressly waived and the case was heard by the court. The evidence of the plaintiff consisted of certain facts agreed upon by stipulation with the defendant, as follows:

> "That the defendant, W. T. Price, on or about August 30, 1911, at Chicago, in said county, offered for sale and sold, two packages of a preservative known as Mrs. Price's Canning Compound; that said canning compound contained 'boric acid;' that the label on said packages bears the following statement: "It is not claimed for this compound that it contains anything of food value, but it is an antiseptic preparation, and among its many uses may be employed to prevent canned fruits and vegetables from souring and spoiling.' That said preservative was not offered for sale or sold in any food product, but was offered for sale and sold separate and apart as a preservative; that the defendant was accorded a hearing before the State Food Commission pursuant to the provisions of the Food Law.'

There was also introduced in evidence on behalf of the people a certain envelope used for enclosing the compound known as Mrs. Price's Canning Compound referred to in the above stipulation.

One one side of the envelope were contained the following words and figures:

> "Mrs. Price's Canning Compound.
> Manufactured by
> The Price Compound Company,
> Minneapolis, Minn.
>
> May be used in canning all kinds of fruit, and is especially valuable for Corn, Beans, Peas, Asparagus, Tomatoes, etc.

May also be used in making Catsup, Sweet Pickles or anything that is liable to ferment. It saves money, time, labor, worry and insures the best results. See book of directions for instruction in using the Compound, and how to do all kinds of canning.

Book with free samples sent to any address on application.

The contents of this package is sufficient for four quarts.

For compound or information call on our agent or address

Mrs. W. T. Price, 1605 Penn Avenue North, Minneapolis, Minn.

(Serial No. 7557)
(Guaranteed by)
(the Price Com-)
(pound Co. un-)
(der the Food)
(and Drug Act)
(of June 30th,)
(1906.)

The other side of said envelope contained the following words and figures:

"NOTICES TO PURCHASERS.

It is not claimed for this compound that it contains anything of food value, but it is an antiseptic preparation, and among its many uses may be employed to prevent canned fruits and vegetables from souring and spoiling.

* * * * *

Retail Price
1 Package 10c. 3 Packages 25c. 7 Packages 50c.
15 Packages $1.00."

Thereupon the state rested.

The defendant then moved to dismiss the complaint and adjudge the defendant not guilty upon various grounds, and the Court overruled the Motion of the defendant and thereafter the defendant offered to prove certain facts constituting his defense.

1st. The defendant offered to prove that Price's Canning Compound is an article of commerce, which has been sold under that distinct name for a period of years, with the ingredients and in the proportions contained in the sample taken by the Food Department, which is the subject of this suit; that it has acquired a wide reputation over a large number of states in the Union, as a distinctive article used for canning by the housewife; that it is not sold by the defendant in any food, nor as a food; nor is it sold to manufacturers of food, or canners of food, for sale; that boric acid is a constituent part of the compound, and has been such during all the time that the compound has been sold; that in the sample taken by the Food Department, and in fact in any other goods sold by the defendant, there is no added ingredient of any kind whatever, whether it be injurious, deleterious or otherwise. (Transcript, page 11, Fol. 18.) After argument, it was agreed between counsel and the court that a witness in court, if sworn and put upon the witness stand to testify, would testify that the Price Canning Compound is an article of commerce which has been sold under that distinct name for a period of years with the ingredients and in the proportions contained in the sample taken by the Food Department, which is the subject of this suit; that it has acquired a wide reputation over a large number of states in the Union as a distinctive article, used for canning by the housewise, and that the testimony should stand in the case as though a witness had so testified. (Transcript page 15, Fol. 26.) The remainder of the offer was objected to, and the court sustained the objection.

2nd. The defendant then offered to prove that boric acid is not injurious to health or to the human system in any way; that when it is taken into the system, either clear or in foods of any kind, which it is preserving, it is in no way assimilated, but is thrown off with the excretions. This offer was objected to by the plaintiff, and the court sustained the objection. (Transcript page 16, Fol. 27.)

3rd. The defendant then offered to prove that Price Canning Compound, mentioned in the statement of claim of the state, is an article of commerce sold in Illinois, in the original package, manufactured and made in Minnesota, and sold in Illinois. It was then agreed that the record might show that a witness, if placed on the witness stand, sworn and examined, would testify to those facts and that the said facts might appear in the case as though actually testified to by such witness. (Transcript, page 17, Fol. 29.)

4th. The defendant then offered to show that Price Canning Compound is not adulterated or misbranded in any way. The plaintiff objected and the court sustained the objection. (Transcript page 17, Fol. 29.)

The defendant then rested and no further evidence was introduced or offered in the case.

The defendant thereupon renewed his motion that the court dismiss the complaint and find the issues in favor of the defendant, but the motion was overruled. Thereupon the defendant submitted certain propositions of law, but the Court refused to hold each and all of them. These propositions of law so refused by the court were in words and figures as follows, to-wit:

1. The court holds as a matter of law that Section 22 of an act entitled:

> "An Act to prevent fraud in the sale of dairy products, their imitation or substitutes, to prohibit and prevent the manufacture and sale of unhealthful, adulterated or misbranded food, liquors or dairy products, to provide for the appointment of a State Food Commissioner and his assistants, to define their powers and duties and to repeal all acts relating to the production, manufacture and sale of dairy and food products and liquors in conflict herewith,"

is unconstitutional and null and void in that the same is in conflict with Section 13 of Article 4 of the Constitution of the State of Illinois, which provides that:

> "No act hereafter passed shall embrace more than one subject and that shall be expressed in the title."

2. The court holds as a matter of law that if the act entitled:

> "An Act to prevent fraud in the sale of dairy products, their imitation or substitutes, to prohibit and prevent the manufacture and sale of unhealthful, adulterated or misbranded food, liquors or dairy products, to provide for the appointment of a State Food Commissioner and his assistants, to define their powers and duties and to repeal all acts relating to the production, manufacture and sale of dairy and food products and liquors in conflict herewith."

is construed to prohibit the sale in original packages in the State of Illinois of Mrs. Price's Canning Compound, a preservative, and if in fact said Mrs. Price's Canning Compound is an article of commerce produced in the State of Minnesota and offered for sale in the State of Illinois in original packages, and if, furthermore, said Mrs. Price's Canning Compound is not in fact unwholesome or injurious, said act is unconstitutional and null and void in that it is contrary to the third subdivision of Section 8 of Article 1 of the Constitution of the United States, which confers upon the Congress of the United States the power to regulate commerce among the several states, and is also contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

3rd. The court holds as a matter of law that the act entitled:

> "An Act to prevent fraud in the sale of dairy products, their imitation or substitutes, to prohibit and prevent the manufacture and sale of unhealthful, adulterated or misbranded food, liquors or dairy products, to provide for the appointment of a State Food Commissioner and his assistants, to define their powers and duties and to repeal all acts relating to the production, manufacture and sale of dairy and food products and liquors in conflict herewith,"

should not be construed to prohibit, and does not prohibit the sale within the State of Illinois in original packages of Mrs. Price's Canning Compound, a preservative, if the same is in fact an article of commerce produced in Minnesota and offered for sale in original packages in the State of Illinois, and if, furthermore, said Mrs. Price's Canning Compound is not unwholesome or injurious.

4th. The court holds as a matter of law that if Section 22 of an act entitled:

> "An Act to prevent fraud in the sale of dairy products, their imitation or substitutes, to prohibit and prevent the manufacture and sale of unhealthful, adulterated or misbranded food, liquors or dairy products, to provide for the appointment of a State Food Commissioner and his assistants, to define their powers and duties and to repeal all acts relating to the production, manufacture and sale of dairy and food products and liquors in conflict herewith,"

is construed to prohibit the use of any preservative containing boric acid which in the fifth subdivision of Section 8 of said act is declared unwholesome and injurious, and if in fact such boric acid in the proportion contained in such preservative is not unwholesome or injurious, said section of said act is unconstitutional and null and void, in that it is contrary to Section 2 of Article 2 of the Constitution of the State of Illinois, which provides that:

> "No person shall be deprived of life, liberty or property without due process of law,"

and is also contrary to Section 1 of the Fourteenth Amendment of the Constitution of the United States, which provides that:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

5. The court holds as a matter of law that the act entitled:

> "An Act to prevent fraud in the sale of dairy products, their imitation or substitutes, to prohibit and prevent the manufacture and sale of unhealthful, adulterated or misbranded food, liquors or dairy products, to provide for the appointment of a State Food Commissioner and his assistants, to define their powers and duties and to repeal all acts relating to the production, manufacture and sale of dairy and food products and liquors in conflict herewith,"

does not prohibit the use of a preservative containing boric acid unless such preservative is in fact unwholesome or injurious.

6. The court holds as a matter of law that if an act entitled:

> "An Act to prevent fraud in the sale of dairy products, their imitation or substitutes, to prohibit and prevent the manufacture and sale of unhealthful, adulterated or misbranded food, liquors or dairy products, to provide for the appointment of a State Food Commissioner and his assistants, to define their powers and duties and to repeal all acts relating to the production, manufacture and sale of dairy and food products and liquors in conflict herewith,"

properly construed prohibits the sale of a preservative containing boric acid, and if in fact such preservative is not unwholesome or injurious, said act is unconstitutional and null and void in that it is contrary to Section 2 of Article 2 of the Constitution of the State of Illinois, which provides that:

> "No person shall be deprived of life, liberty or property without due process of law,"

and is also contrary to Section 1 of the Fourteenth amendment of the Constitution of the United States, which provides that:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

7. The court holds as a matter of law that the evidence herein does not show the commission by the defendant of any offense against the laws of the State of Illinois, or more particularly against an act entitled:

> "An Act to prevent fraud in the sale of dairy products, their imitation or substitutes, to prohibit and prevent the manufacture and sale of unhealthful, adulterated or misbranded food, liquors or dairy products, to provide for the appointment of a State Food Commissioner and his assistants, to define their powers and duties and to repeal all acts relating to the production, manufacture and sale of dairy and food products and liquors in conflict herewith."

The court found the defendant guilty and assessed his fine at the sum of $50. After the usual motions for a new trial and in arrest of judgment had been made and overruled, the court entered judgment on the finding that the defendant was guilty, and ordered that he be fined $50 and costs of suit.

Thereupon the defendant Price appealed to the Supreme Court of the State of Illinois from the judgment of the lower court upon the following alleged errors:

First. The court erred in holding that the acts of the plaintiff in error herein shown by the evdence constituted an offense against the laws of the State of Illinois.

Second. The court erred in failing to hold that if an act entitled:

> "An Act to prevent fraud in the sale of dairy products, their imitation or substitutes, to prohibit and prevent the manufacture and sale of unhealthful, adulterated or misbranded food, liquors or dairy products, to provide for the appointment of a State Food Commissioner and his assistants, to define their powers and duties, and to repeal all acts relating to the production, manufacture and sale of dairy and food products and liquors in conflict herewith,"

or any part thereof, prohibits the acts of the plaintiff in error herein, as shown by the evidence, said act, or such part thereof, is unconstitutional and null and void, in that the same is contrary to Section 2 of Article 2 of the Constitution of the State of Illinois, and is also contrary to the third division of Section 8 of Article 1 and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Third. The court erred in failing to hold, as a matter of law, that Section 22 of said act is unconstitutional and null and void in that the same is in conflict with Section 13 of Article 4 of the Constitution of the State of Illinois.

Fourth. The court erred in refusing to dismiss the suit against the plaintiff in error herein and to hold the plaintiff in error not guilty.

Fifth. The court erred in refusing each and every of the propositions of law refused by the court.

Sixth. The court erred in finding the plaintiff in error guilty of a violation of the dairy and food law, being the law above mentioned, and in sentencing said plaintiff in error to pay a fine in the sum of $50 and costs of suit.

Seventh. The finding and judgment of the court are contrary to the evidence.

Eighth. The finding and judgment of the court are contrary to the law.

Ninth. The finding and judgment of the court are contrary to the law and the evidence.

The Supreme Court of the State of Illinois February 20, 1913, affirmed the decision of the lower court and the plaintiff in error, W. T. Price, appealed to the Supreme Court of the United States, assigning errors in the records and proceedings of said case as follows:

The Supreme Court of Illinois erred in holding and deciding that Sections 8 and 22 of Chapter 127-B, Hurd's Revised Statutes of the State of Illinois, were valid. The validity of said Sections was denied and questioned by the defendant on the ground of their being repugnant to the Constitution of the United States, and in contravention thereof.

The said Errors are more particularly set forth as follows:

The Supreme Court of Illinois erred in holding and deciding:

1st. That said Sections 8 and 22 did not abridge the privileges and immunities of citizens or of the Plaintiff in

Error as guaranteed by the 14th Amendment to the Federal Constitution.

2nd. That although said Sections were construed to prohibit the sale in original packages in Illinois of a preservative, and although it were the fact that said preservative was produced in the State of Minnesota and offered for sale in Illinois in original packages, said Sections or either of them, were not unconstitutional and void as being contrary to the 3rd Subdivision of Section 8 of Article 1 of the Constitution of the United States, and also as being contrary to Section 1 of the 14th Amendment to the Constitution of the United States.

In support of this appeal and of its propositions we submit the following:

1st. If the Act prohibits the sale of Defendant's Compound, merely becaus it contains boric acid, without proof that it is harmful, it contravenes Section 1 of the Fourteenth Amendment of the Constitution of the United States to the effect that no person shall be deprived of liberty or property without due process of law.

2nd. In so far as the Act purports to prohibit the sale in Illinois in original packages of a preservative manufactured in another state, it encroaches upon the exclusive power of Congress to regulate commerce among the states.

ARGUMENT.

The primary questions involved in the present case are two:

First. Is the sale of a harmless preservative in the State of Illinois prohibited by the Dairy and Food Law merely because it contains boric acid?

And if such is the effect of the statute, is so much of it constitutional?

Second. Can the State of Illinois in any event prohibit the sale of a harmless preservative manufactured in another state and sold in Illinois in the original package, even if the Legislature has declared that the preservative is harmful because it contains boric acid?

These questions are raised not only by the judgment of the trial court in the case under review, but by the court's ruling on evidence and propositions of law. The state offered no evidence that the preservative complained of was injurious and the defendant offered evidence that it was harmless, which was refused. It was admitted that the preservative was manufactured in Minnesota and sold in Illinois in the original package. The court refused to hold propositions of law to the effect that the Dairy and Food Law, rightly interpreted, does not prohibit the sale in Illinois of such a preservative as that here involved, and that if it did it would be unconstitutional as beyond the scope of the title, as a deprivation of property and denial of the equal protection of the laws, and as an interference with interstate commerce. We now respectfully submit that these propositions were correct; that they should have been held and judgment entered accordingly for the defendant.

I.

The only reliance of the State in this case for proof of one of the material allegations of the complaint, namely, that the compound sold by the defendant was unwholesome and injurious, is upon the language of the Dairy and Food Act.

The gist of the offense charged in this case is the sale of an unwholesome and injurious preservative in violation of Section 22 of the Dairy and Food Act which prohibits the sale of any unwholesome or injurious preservative or any mixture or compound thereof intended as a preservative of any food. Hurds R. S. (1911) 2218. The section cited does not condemn a preservative as unwholesome or injurious because it contains boric acid. Furthermore, the state offered no evidence that a preservative containing boric acid was unwholesome and injurious. The only reliance of the state was upon Section 8 of the statute, dealing with the adulteration of confectionery and food, and especially upon the fifth subdivision of Section 8 to the effect that food shall be deemed adulterated

> "If it contains any added poisonous or other deleterious ingredient which may render such article injurious to health,"

and that four substances, including boric acid, are thereby *declared* unwholesome and injurious. Hurd's R. S. (1911) 2213. Thus one of the essential elements in the alleged offense of the defendant, namely, the unwholesomeness of the preservative sold by him, was entirely unsupported by evidence, and the prosecution rested solely upon the language of the statute above cited.

In the case of some substances doubtless a legislative declaration that they were unwholesome and injurious would be reinforced by the judicial knowledge of the court that such was the case in fact. Such a conclusion would not be warranted, however, in the case of boric acid which in proper quantities is a harmless and effective antiseptic and preservative. (Article on Boracic Acid, "The Americana," Vol. 11.)

A brief statement of the general nature and characteristics of boric acid may be pertinent in this connection. It is a compound of boron with oxygen and hydrogen and possesses acid properties. It is found in its natural though impure state in the crater of Vulcano, one of the Lepari Islands. ("The Americana," supra.) It is also found in large quantities in Tuscany and appears in appreciable quantities in the ash of many coals and sea salt. It is contained in small quanties in the water of the Seine River. (Henry Jay, Journal of the Chemical Society, May 1906.) It is produced chemically and artificially by the decomposition of a hot solution of borax and sulphuric acid. The boric acid separates upon cooling. It is a white, glassy substance, slightly soluble in cold water and more soluble in hot water. Its solutions are beneficial for cleansing the eyes, nose and mouth, and it is frequently used internally as an antiseptic. ("The Americana," supra.)

Although boric acid may be chemically produced, it is a natural preservative of the class of malic, citric and benzoic acids which appear in many vegetables and fruits such as oranges, apples, cherries, pineapples, currants and berries. The length of time which these fruits will last without decay depends very largely upon the proportion of such acids which they contain. In 1888 boric acid was discovered in the ash of California wines by Dr. G. Baumert. As he shows in a discussion of the presence of boric acid in wine, published in German, at first the acid was thought to be an adulteration of some kind, but the contrary was proved. Later the presence of boric acid was shown in the leaves and wood of various species of vine. Dr. Ripper at Schmidt's Laboratory in Weisbaden, had previously found boric acid in its natural state in more than one thousand different German and foreign wines. Boric acid also seems to be invariably present in watermelons.

As boric acid is thus found naturally in many vegetable products, so its use in the preserving of vegetables is harmless and effective as an antiseptic. The wrapper on the package of the defendant's preservative indicates that the quantity of the compound enclosed is sufficient for use in four quarts of preserved fruit or vegetables. In this proportion it amounts to only one one-hundred and twentieth of one per cent. (1/120 of 1%) of the finished product,—an exceedingly small dose. Thus used in canned goods, such as canned corn, it preserves not only its taste, but its color as well. Moreover, the use of boric acid prevents the production of toxic germs, thus largely reducing the danger of ptomaine poisoning. (Dr. E. Klein, Lecturer on Advanced Bacteriology, St. Bartholomew's College, in Public Health," September, 1910.) In other words, not only does the general information of mankind not warrant the conclusion that boric acid in proper quantities as a preservative is harmful, but it leads to the opposite conclusion. In considering, therefore, the question whether the Dairy and Food Law prohibits the sale of such a preservative as that sold by the defendant, merely because it contains boric acid and whether if such is the correct interpretation of the statute it is constitutional, it is necessary to avoid any preconceived idea which might result from the statute, that boric acid in the form in which it is contained in the defendant's preservative, is in fact either unwholesome or injurious.

Therefore the legislative pronouncement in the Act that boric acid is unwholesome or injurious does not make it so if contrary to fact, and will not sustain the pending prosetion. We recognize the principle enunciated by the Court with reference to judicial interference with a legislature where the question of the wholesomeness of an article is *fairly* in dispute.

Powell v. Pennsylvania, 127 U. S. 678.
State v. Layton, 160 Mo. 474.
Adams v. Milwaukee, 144 Wis. 371.
Sanders v. Commonwealth, 117 Ky. 1.
Iowa v. Schlenker, 112 Ia. 642.

We submit, however, that this case is not of such a character. If the Supreme Court of Illinois had examined the only contrary report ever made by any authority on the subject of whether or not boric acid was harmful, they would have discovered that the question was not fairly in dispute, at all. The State quoted, (but did not produce in evidence) from an experiment alleged to have been had by the Bureau of Chemistry at Washington, in which certain conclusions were made which *might* be construed as indicating that boric acid *might* be harmful. A careful examination of that very report, and the physical facts surrounding the experiment, would be sufficient to convince any fair-minded person or Court that boric acid was absolutely harmless, at least when used in the quantities ordinarily used as a preservative. The experiment was worthless for the following reasons:

1st. The hygienic conditions surrounding the attendance upon the borax table were inefficient and unhealthy.

2nd. The preservative was administered in capsules, and would therefore allow no conclusions whatever as to the effect of borates when added to food.

3rd. There was no control of the subjects except at the borax table, and therefore the members of the squad might do a thousand and one things over night that would cause slight disturbances not attributable to the boric acid, at all.

4th. The method of supervision was not sufficient, and admittedly so.

5th. There were not enough subjects, nor was the experiment long enough to determine anything.

6th. Dr. Wiley himself admits that the data was not decisive, but merely suggestive, and also admits that his investigations were not exhaustive enough.

7th. The differences recorded in actual figures concerning the various results are so infinitesimal as to amount practically to nothing, and whatever they were, might be easily ascribed to many causes other than the administration of the Boric Acid.

See 3rd Treatise Effects of Boric Acid by Dr. Oscar Liebreich, University of Berlin.

8th. It is also admitted that all of the subjects engaged in the Experiment declared themselves to be in better physical condition after the Experiment than they had been before.

Therefore, when we stop to consider that the conclusions stated in this report are not borne out by the figures in the report itself, and when we consider further that these conclusions *are the only conclusions ever made* that claim the slightest harm in the use of Boric Acid, and when we consider further that all the eminent authorities of this land as well as England and Germany are a unit in declaring for the harmlessness of this substance, we say that it is not fair to assume that it is a matter really in dispute, at all. We must also add to this the fact that the man who conducted this Experiment conducted other Experiments and his conclusions in those Experiments were denied by the Referee Board of the Bureau of Chemistry. It gives us further basis for the statement that Dr. Wiley is not an authority of any note, at all.

We wish to state one further fact which indicates in a very concrete way the position of the Government at this time in connection with this Experiment of the Bureau of Chemistry, made ten years ago. In April, 1911, the Plaintiff in Error in this case, at the instance of the Bureau of Chemistry, headed by Dr. Wiley, was arrested for selling his Compound, which, so the Government alleged, contained Boric Acid, a harmful and injurious substance. The arrest was made under the Food and Drugs Act and in connection with Interstate Commerce. The Defendant was ready for trial at the October, 1911, Term of the United States Court, but the Government was not ready for trial, and asked for a continuance. It was continued to April, 1912, and then to April, 1913, and then to October, 1913, and then to April, 1914, and then to October, 1914. During all that time the Defendant was ready for trial and ready to prove that Boric Acid was absolutely harmless. In the meantime Dr. Wiley had left the Bureau of Chemistry and no longer directed its destinies. A new reign of safer and saner methods came in. I need not offer any suggestions as to what was in the mind of the Government, but the fact is that in October, 1914, this case, after running for three years and a half, was dismissed by the Government. Consequently, whatever influence the report of the Bureau of Chemistry with reference to Boric Acid might have had, it certainly no longer had any influence or the Government would have proceeded with its case.

> See United States of America v. Price, U. S. District Court, State of Minnesota, 4th Division.

At this point we wish to call attention to the fact that so far as preservatives are concerned, there is no pronouncement in the Illinois Law against Boric Acid. The wording in the preservative Section of the Statute (Section 22)' is against the sale of any injurious or unwholesome preservative. The State has not proven in this case that our preservative is harmful. It relies wholly upon the Food Section of the Statute (Sec. 8) which provides—in effect—that Boric Acid as an *added* ingredient is injurious. We maintain that our product is not affected by that Section of the Statute (Section 8) for two reasons:

1st. We are not selling a food with Boric Acid as an ingredient.

2nd. We are not selling a preservative with any *added* ingredient whatever.

The facts admitted in the case are that Mrs. Price's Canning Compound has been sold under that name as a trade name for a number of years, with its ingredients in the same proportion, and that one of the constituent parts of the original Compound was and is Boric Acid. (Transcript page 15, Fol. 26.) In other words, there was no *added* ingredient whatever, and the Statute inhibits the sale only in case of added ingredients that are unwholesome and injurious.

U. S. A. v. Forty Barrells and 20 Kegs of Coca Cola, Eastern District of Tennessee, 6th Circuit, June 13, 1914.

In that case the Court held that the word "added" in the Statute had a definite meaning and that where an ingredient was a constituent part of the original Compound, it could not be called "added," and that the Statute did not refer to any ingredients making up the original article. The case was appealed by the Government to the United States Circuit Court of Appeals, and the decision affirmed June 13, 1914.

To be more specific, if Price's Canning Compound was to be condemned under Section 8 of the Statute referring to Foods, then it must be condemned on the ground that Boric Acid was an *added* ingredient. The admitted facts show the contrary. It is admitted in the case that the same facts are true concerning Boric Acid in Price Canning Compound as were true of Caffein in Coca Cola in the Coca Cola case above cited. The Boric Acid was not an *added* ingredient, but was an original ingredient of Price's Canning Compound.

Again, if we are to be convicted under the Preservative Section of the Statute, Section 22, we must be convicted by reason of the fact that Boric Acid is injurious *in fact.* No proof was offered, and there was no evidence in the case, that Boric Acid was, or is, injurious. So the prose-

-cution fails there. The Honorable Supreme Court of Illinois holds that the two sections should be construed together for the purpose of giving the Statute effect. Even if that were done, we must insist that the same construction be placed upon the Food Section *when combined with the Preservative Section* as would be put upon the Food Section separately. In other words, if the language of the Food Section is to supplement the language of the Preservative Section in order to furnish the proof under the Preservative Section, then we must insist that the so-called injurious ingredient must be an "added" one. And there again the prosecution fails.

But in construing these two Sections together, the Honorable Supreme Court of Illinois overlooked a very important fact. That fact was mentioned by Mr. Heyburn in the Senate (Congressional Record, Vol. 40, part 2, page 1131), and was commented on in the decision of this Court in the Bleached Flour case. (U. S. A. v. Lexington Mill & Elevator Co.) Mr. Heyburn says:

> "As to the use of the term 'poisonous,' let me state that everything which contains poison is not poison. It depends on the quantity and the combination. A very large majority of the things consumed by the human family contain, under analysis, some kind of poison, but it depends upon the combination, the chemical relation which is bears to the body in which it exists as to whether or not it is dangerous to take into the human system."

In other words, the Illinois Court failed to recognize the different effects of different chemical combinations as to whether or not the *result* would be a poison. The combination of an Acid with a food might create a poisonous result without the acid being necessarily harmful at all, and vice versa, and it is clearly a wonderful stretch of the imagination to say that the Legislature had in mind the Food Section of the Statute when it passed the Preservative Section. It seems clear that the section in which this declaration concerning Boric Acid occurs, relates only to food and its adulteration; that when it is declared that Boric Acid is unwholesome and injurious, it is meant that Boric Acid in combination with a food is an added ingredient such as to render the food adulterated within the meaning of Section 8 of the Act. This is very different from a declaration that for any and all purposes, and in whatever manner used, Boric Acid is unhealthful and injurious, and the Statute cannot, consistently with the context, be broadened into such a general pronouncement.

The legislature by Section 8 stamped certain substances as unwholesome and injurious *when used in food products.* If it had been the intention of the legislature to place a similar ban upon given substances used in preservatives, it would seem only natural that it should have mentioned such substances specifically in connection with Section 22 of the act which prohibits the sale of unwholesome and injurious preservatives. The language of Section 22 is a clear intimation that there are preservatives which are wholesome, and the logical conclusion from the omission to brand preservatives composed of any given substances as wholesome, is that the legislature intended to prohibit only such preservatives as were *in fact* unwholesome and injurious.

For the foregoing reasons, therefore, we maintain that the prosecution should have been dismissed because there was no actual proof of the injurious character of Price's Canning Compound. Properly construed, the sale of a harmless Preservative is not prohibited by the Illinois Dairy and Food Law.

II.

But if the Statute is so construed, and by reason of the language thereof the State made out a case, then *is* so much of it constitutional? IF THE DAIRY AND FOOD ACT FORBIDS THE SALE WITHIN THE STATE OF ILLINOIS OF PRESERVATIVE COMPOUNDS CONTAINING BORIC ACID, NOTWITHSTANDING THAT THEY ARE WHOLESOME, THE ACT IS UNCONSTITUTIONAL, NULL AND VOID.

1st. The Statute as construed by the State would be a deprivation of liberty and property within the meaning of Section two of Article two of the Constitution of Illinois and to a similar deprivation and a denial of the equal protection of the laws as contemplated by Section 1 of the Fourteenth Amendment of the Constitution of the United States.

The state relied entirely for proof of the gist of the complaint in the pending case, namely, that the defendant's compound was unwholesome and injurious, upon the language of Section 8 of Dairy and Food Act by which it is declared that boric acid is unwholesome and injurious. We have previously urged that the context of the section shows that the provision cited has no reference to boric acid as an ingredient in preservatives. If, however, such were not the correct view and if it were the fair interpretation of the act that it forbids the sale of a preservative, notwithstanding evidence that it is harmless, merely because it contains boric acid, the act would plainly be unconstitutional.

The court takes judicial notice of the statutes of the state and in the absence of evidence to the contrary, a conviction for the sale of a compound prohibited by the statute here involved might be sustained notwithstanding the absence of evidence that it was harmful; but when evidence is offered that the compound is harmless, can it be gainsaid that it is the duty of the court to hear it, and, if it produces conviction, to hold the defendant not guilty? Certainly the legislature cannot destroy rights of liberty or property by a legislative declaration which is contrary to fact. The principle was recently illustrated in the case of People v. Economy Light & Power Co., 241 Ill. 290. The rights of the company in that case turned in part upon the question whether or not the Des Plaines river was navigable. The state referred in proof of its navigability to acts of the legislature in which the river was declared to be navigable. The court said, however, at page 330, supra:

> "But even if the legislature had declared in unequivocal language that the Des Plaines river was navigable as it did by the Act of 1907, such declaration could not have the effect of depriving appellee of vested rights as riparian proprietor, if such rights exist."

In Horwich v. Walker-Gordon Laboratory Co., 205 Ill. 497, this court held an act unconstitutional which prohibited the use of registered receptacles for the sale of commodities, without the consent of the persons by whom they were registered, on the ground that it arbitrarily restricted the rights of users of such receptacles. The principle that property rights cannot be destroyed by an arbitrary declaration of the legislature contrary to the fact was stated by the court at page 506, supra, as follows:

> "In view of the fact that this statute does not come within the police power of the state it is beyond the power of the Legislature to make unlawful the purchase of one of these receptacles without the written consent of the owner from whom it was purchased. As was said by this court in Gillespie v. People, 188

> Ill. 176, the legislature has no authority to pronounce the performance of an innocent act criminal when the public health, safety, comfort or welfare is not interfered with."

There are numerous cases (two of which are cited in our brief) in which it has been held that the declaration by municipalities that given objects are nuisances, is invalid if contrary to fact. The conclusion from these decisions and from the manifest justice of the matter is that even if the Dairy and Food Law declared a preservative containing boric acid to be injurious, the declaration would not be conclusive if contrary to fact, and the defendant should have been given an opportunity to prove that it was contrary to fact. Inasmuch as the opportunity was denied, it must be assumed on this hearing that the defendant's evidence would have had the effect for which it was offered and that the preservative herein involved was harmless. Under that hypothesis certainly, the sale of the preservative cannot be prohibited by virtue of the arbitrary declaration of the legislature, if such declaration there is, that it is harmful.

In our brief we have cited only a few of the cases to the effect that the arbitrary prohibition or interference with a harmful business amounts to a deprivation of liberty and property within the meaning of the State and National Constitutions. The principle is so well established that the briefest citations from the decisions will suffice.

In City of Chicago v. Netcher, 183 Ill. 104, the court held invalid an ordinance of the City of Chicago prohibiting the sale of meats in a store dealing in dry goods, clothing, jewelry and drugs. The court said at page 110, supra, referring to the National and State Constitutions:

> "When an owner is deprived of the right to expose for sale and sell his property he is deprived of property within the meaning of the constitution by taking away one of the incidents of ownership. Liberty includes the right to pursue such honest calling or vocation as the citizen may choose, subject only to such restrictions as may be necessary for the protection of the public health, morals, safety and welfare."

On page 111, supra, the court stated that under the police power a city might pass ordinances which tend toward the prevention of offenses or the preservation of the public health, morals, safety or welfare, but it added:

> "It must be apparent that some such end is the one actually intended and that there is some connection between the provisions of the law and such purpose. If it is manifest that the statute or ordinance has no object but under the guise of a police regulation is an invasion of property of the individual, it is the duty of the court to declare it void."

It is manifest that the prohibition of the sale of a preservative which is wholesome and not injurious has no reasonable connection with the preservation of the health of the community. Therefore in accordance with the principle laid down in the Netcher case, supra, such a prohibition if contained in the Dairy and Food Act, would be invalid.

Cases in other states illustrate that the prohibition of the sale of a pure article of food or preservative is as much within the constitutional protection of liberty and property, as the sale of any other proper article of commerce. In the case of City of Helena v. Dwyer, 64 Ark. 424; 39 L. R. A. 266, the court held illegal an ordinance of the City of Helena forbidding the sale of fresh pork between the first days of June and October in each year. The basis of the decision of the court was the principle laid down in the case of In re Jacobs, 98 N. Y. 110, in which the court said:

> "Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient, and appropriate to accomplish these ends the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and endorse the supreme law."

In the course of the opinion, the court in the Dwyer case, supra, quoted at length from Tiedeman's work on the limitations of police powers, in which the principle is laid down that the sale of substances which are wholly injurious, such as diseased meats, may be prohibited, but the sale of substances which are wholesome when properly used and harmless in appropriate quantities, may not be prohibited merely because when used in excess or in a wrong way they may be harmful. The reasonableness of this principle is apparent and the necessity of it, if mankind is not to be deprived of drugs and other articles which are requisite in their place, such as strychnine used for medicinal purposes. An antiseptic preparation is not a food nor a liquor. The very qualities which make it an effective preservative might render it harmful if habitually used in saturated solution as a beverage, but that is true of many articles of commerce. Wood alcohol is a rank poison, yet the prohibition of the sale of wood alcohol on the ground that used as a beverage it would be fatal, could not for a moment be sustained. The sale of it might properly be regulated in such a manner as to prevent deception or adulteration. The consumer of wood alcohol for proper purposes is entitled to the benefit of all the qualities which it possesses in their natural strength and he is entitled to know that it is wood alcohol and not grain alcohol in order that he may not unwittingly be poisoned. But he is equally entitled to procure wood alcohol and the manufacturer is entitled to sell it provided there is no deception or adulteration. We maintain that the same principle applies to the sale of preservatives and that the sale of a preservative which is a wholesome antiseptic, harmless in the quantities and proportions in which it is designed to be and is naturally used cannot be prohibited merely because if used for an entirely different purpose for which it is in no way intended, it might cause injury.

In numerous cases the manufacture and sale of oleomargarine in imitation of butter, have been held unlawful where so declared by statute, but whenever a statute has prohibited the manufacture and sale of oleomargarine without deception, it has been held unconstitutional in that the manufacture and sale of a wholesome article of food cannot be prohibited. Probably the leading case in this matter is People v. Marx, 99 N. Y. 377. The court said at page 385, supra, that the object of the statute was to prohibit absolutely the manufacture and sale of oleomargarine as a substitute for butter notwithstanding there was no evidence that it was unwholesome. The case was similar to the pending case in this respect: that although in the case cited evidence that oleomargarine was wholesome was introduced, the court later struck out the testimony—and the issue as in the pending case, which was presented to the reviewing court, was whether the legislature is competent to declare an article of commerce harmful and prohibit its sale, notwithstanding that it may be in fact unharmful. In reaching its conclusion in the negative, the court was controlled by the following conclusion concerning the constitutional safeguards of liberty and property:

> "Among these no proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. (Live Stock Assn. v. The Crescent City, etc., 1 Abb. (U. S.) 398; Slaughter House Cases, 16 Wall. 106; Corfield v. Coryell, 4 Wash. C. C. 380; Matter of Jacobs, 98 N. Y. 98.)"

We now come to the case of People v. Biesecker, 169 N. Y. 53, 57 L. R. A. 178, which is strikingly similar to the case at bar in that it was a prosecution for the sale of a preservative called "preservaline" for use with butter, in violation of a statute to the effect that no person should sell any butter products containing a preservative, provided that it should not be construed to prohibit the use of salt in butter or cheese. The defendant's preservative did not come within the statutory exception of preservatives permitted. In holding such prohibition beyond the power of the legislature the court laid down the principles governing food regulation as follows:

> "(1) That the legislature cannot forbid or wholly prevent the sale of a wholesome article of food;
> (2) That legislation intended and reasonably adapted to prevent an article being manufactured in imitation or semblance of a well-known article in common use and thus imposing upon consumers or purchasers, is valid;
> (3) That in the interest of public health the legislature may declare articles of food not complying with a speciefid standard, unwholesome and forbid their sale."

In accordance with these principles the rule was laid down that,

> "The sale and consumption of a well-known article of food or a product conclusively shown to be wholesome, could not be forbidden by the legislature even though it assumed to enact the law in the interest of public health."

The court closed its opinion with an observation on the subject of preservatives and their legitimate use, which deserves consideration here. It said:

> "The preservation of food and the arrest of its tendency to decay is certainly a proper and lawful object in itself. It is a work in which man has been engaged, to some extent, from earliest history. It is the subject of large industries in this country, and the products of those industries are generally used by the community, and are lawful objects of manufacture and sale. The industry has grown to an enormous extent. These are matters of common knowledge. There is doubtless in the prosecution of these industries danger of adulteration, and of the use of processes injurious to public health. The regulation of these subjects for the protection of the public health and the prevention of imposition on consumers is within the power of the legislature, and the propriety of its exercise cannot be questioned. But, while it may

> regulate, the legislature may not destroy, the industry; and that is not a valid regulation, which, in dealing with the means of preserving food, makes the preservation of food itself an unlawful act. Ingredients and processes may be prohibited as unwholesome or causing deception, but not solely because they preserve."

To sum up, the rational conclusion on the present branch of the case would seem to be this: that although the use of injurious preservatives may be prohibited, yet the use of proper preservatives may not be prohibited merely because they are not appropriate for use as foods. Neither can a legislative declaration that a given ingredient, and therefore a preservative containing it, is harmful, and should be prohibited, be sustained if the preservative in fact subserves a useful purpose and is wholesome when used therefor. In declining to hold the propositions submitted by the defendant to this effect and in refusing to hear the evidence which would have enabled him to determine whether the defendant's preservative was in fact harmful, the trial court erred to the substantial prejudice of the defendant.

2nd. The prohibition of the sale of the Defendant's preservative merely because it contains boric acid, would be invalid for the further reason that thereby he would be denied the equal protection of the laws. Boric acid is a drug which can be procured of any druggist. The state would not contend that under the Dairy and Food law its sale by druggists even though coupled with an advertisement similar to that of the defendant's compound, that it is an antiseptic and capable of use as a preservative could be prohibited. Thus if the prosecution of the defendant is sustained, the defendant will be prevented from doing what is permitted as a matter of course to druggists; that is: selling boric acid, for it is only in so far as the defendant's compound contains boric acid, that the sale of it is attacked by the state. If it be urged that the druggist sells boric acid openly, whereas it does not appear upon the label that the defendant's compound contains boric acid, it is a sufficient reply that the gist of the state's complaint is, not that there is deception in the sale of the defendant's product, but merely that it contains boric acid. Furthermore, we make no question that as a proper method of regulation it might be within the power of the state to prescribe the publication on the label or package enclosing the compound, of the ingredients entering into it. That, however, is not the question here. The question is simply whether the sale of the compound can be absolutely prohibited merely because it contains boric acid, whereas the sale of boric acid is permitted without question, to druggists. The qualities of the substance are the same in the one case as in the other. To permit its sale in the one case and forbid it in the other is certainly a denial of the equal protection of the laws.

That a statute which thus discriminates is in violation of the state and national constitution, needs no extended argument We merely desire to refer to the cases, some of which we have collected in our brief, in which the doctrine of the equality of rights under the constitution has been enunciated. As the court in Frorer et al. v. People, 141 Ill. 171, at page 186:

> "The police power is limited to enactments having reference to the comfort, the safety or the welfare of society, an dunder guise of it a person cannot be deprived of a constitutional right. It is impossible that, under that power, what is lawful if done by A, if done

> by B can be a misdemeanor, the circumstances and conditions being the same."

The court also applied this principle in People v. Wilson, 249 Ill. 195, in which a statute which required of any itinerant vendor of a drug, a license fee of $100 a month, was held unconstitutional. The court said that on account of the tax, which was so high as to be prohibitive, the effect of the statute was to give druggists a monopoly of the business of selling patent or proprietary medicines, without any additional protection to the health of the public, and that for this reason inasmuch as the statute discriminated between druggists and other persons, such as grocers, who might equally well sell such medicines, the statute was invalid. Similarly, if the Dairy and Food law is to be construed as prohibiting the sale of preservatives merely because they contain boric acid, whereas the sale of boric acid is permitted to druggists, it is partial and discriminatory and cannot be sustained. The sale of preservatives may be regulated in such a manner as to insure the purity of the product and publicity of the ingredients composing it, but it cannot be prohibited merely because one of the ingredients is boric acid while the sale of boric acid in other forms and by other classes of the community than vendors, of preservatives, continues unhindered.

3rd. The Statute as construed by the State would be unconstitutional as an infringement upon the power of Congress.

A final objection to the conviction of the defendant in the pending case is that the attempted prohibition of the sale of the defendant's preservative amounts to an interference with Interstate Commerce. It was admitted for the purposes of the case that the preservative referred to in the statement of claim is an article of commerce manufactured and made in Minnesota and sold in Illinois in the original package. The question thus arises whether in any event the Dairy and Food Law should be interpreted to refer to the sale of a preservative imported from another state and sold in Illinois in the original package, or whether if that be its effect so much of it is legal. We have already urged that under a reasonable interpretation the act does not apply to the sale of a preservative of the character here involved. We now submit that inasmuch as it is undisputed that the preservative is manufactured in Minnesota and sold in Illinois in the original package, it is subject to regulation only by the national government and not by the state.

By the Constitution of the United States the power is conferred upon Congress

> "To regulate commerce with foreign nations and among the several states and with the Indian tribes."
>
> Hurd's R. S. (1911) X.

It is a consequence of this provision that a state is without power to prohibit the introduction of articles of commerce from another state and their sale in the original package. If a particular article is detrimental it is for the United States and not the state to determine, and what the United States permits a state cannot forbid.

Hardly any principle has been more frequently discussed and certainly none is now more firmly established in the decisions of the Supreme Court of the United States. One or two cases are typical. In Hannibal & St. Joseph Railroad Company v. Husen, 5 Otto, 465, 24 L. Ed. 527, the court considered a statute of Missouri providing that no Texas, Mexican or Indian cattle should be driven into the state between the first day of March and the second day of November in each year. Without hesitation the court declared the statute an infringement upon the power of Congress. It said of the act:

> "It is a plain regulation of interstate commerce; a regulation extending to prohibition. Whatever may be the power of a State over commerce that is completely internal it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations."

Of the decisions of the Supreme Court of Illinois to the contrary, the court spoke as follows:

> "In coming to such a conclusion, we have not overlooked the decisions of very respectable courts in Illinois, where statutes similar to the one we have before us have been sustained. Yeazel v. Alexander, 58 Ill. 254. Regarding the statutes as mere police regulations, intended to protect domestic cattle against infectious disease, those courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they have said, was for the Legislature and not for the courts. With this we cannot concur. The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intruism."

In consequence of the decision of the United States Supreme Court in the Husen case, supra, the Supreme Court of Illinois in the case of Salzenstein et al. v. Mavis, 91 Ill. 390, reversed its attitude in the case of Yeazel v. Alexander, 58 Ill. 254, referred to in the Husen case, and held that a statute forbidding the introduction of Texas or Cherokee cattle into Illinois except betwen the first day of October and the first day of March following of each year, was unconstitutional on the same ground as the similar statute of Missouri.

The right of a state to prohibit the introduction of a wholesome article of food from another state was involved in the case of Schollenberger v. Pa., 171 U. S. 1; 43 L. Ed. 49, in which it was held that a statute of Pennsylvania forbidding the sale of oleomargarine to the extent that it prohibited the introduction of oleomargarine from another state and its sale in the original package, was invalid. In this decision the court laid down the controlling principle at page 12, supra, as follows:

> "The general rule to be deducted from the decisions of this Court is that a lawful article of commerce cannot be wholly excluded from introduction into a State from another State where it was manufactured or grown. A State has power to regulate the introduction of any article including a food product so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food."

In the same tenor it was said on page 14, supra:

> "In the execution of its police power we admit the right of the State to enact such legislation as it may deem proper even in regard to articles of interstate commerce for the purpose of preventing fraud or deception in the sale of any commodity and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the state. But in carrying out its purpose the State cannot absolutely prohibit the introd9uction within the State of an article of commerce like pure oleomargarine."

State legislation affecting interstate commerce, which was sustained as coming within the exception noted in the Schollenberger case, supra, namely, that it tended to prevent fraud and deception, is illustrated in the cases of Crossman v. Lurman, 192 U. S. 189, 48 L. Ed. 401, and Plumley v. Mass. 155 U. S. 461, 39 L. Ed. 223. In the latter case the Supreme Court of the United States upheld a statute of Massachusetts prohibiting the sale of oleomargarine manufactured in imitation of butter, saying:

> "We are of opinion that it is within the power of a state to exclude from its markets any compound manufactured in another state which has been artificially colored or adulterated so as to cause it to look like an article of food in general use and the sale of which may by reason of such coloration or adulteration cheat the general public into purchasing that which they may not intend to buy."

In the former case the Supreme Court sustained a prosecution by the State of New York for the adulteration of coffee by artificially coloring the beans. This decision was based upon the principle of the Plumley case, supra, that state regulations designed to prevent deception in the sale of a product which is an article of interstate commerce, do not infringe upon the power of Congress to regulate such commerce.

Manifestly neither on the ground of preventing deception nor on the ground of adulteration can the prosecution for the sale of the preservative here involved be sustained, because no deception nor adulteration is charged. The only charge is that the defendant sold a preservative containing boric acid. The prohibition of such a sale in the absence of any evidence of the harmfulness of the product or facts showing it to be injurious of which the court can take judicial notice, is clearly within the principle of the Schollenberger case, supra, and is therefore in conflict with the Federal Constitution.

Subsequently in the opinion in the Schollenberger case, supra, the Court declared that in certain cases, as for instance in the case of intoxicating liquors, a state might forbid the manufacture and sale within the state of articles deemed injurious, but it would not be within the power of the state to prohibit the introduction from another state and the sale in the original package, even of such articles, because the power to determine what commodities shall be deemed proper subjects of interstate commerce is vested exclusively in Congress.

On this point the court said at pages 16-17, supra:

> "The legislature of the state has the power in many cases to determine as a matter of state policy whether to permit the manufacture and sale of articles within the state, or to entirely forbid such manufacture and sale so long as the legislation is confined to the manufacture and the sale within the state. Those are questions of public policy which, as was said in the case of Powell, belong to the legislative department to determine; but the legislative policy does not extend so far as to embrace the right to absolutely prohibit the introduction within the limits of the state of an article like oleomargarine properly and honestly manufactured."

Accordingly it was held in Leisy v. Hardin, 135 U. S. 100, 34 L. Ed. 128, that a statute of Iowa prohibiting the manufacture and sale of intoxicating liuors, in so far as it might operate to prevent the sale of liquors manufactured in another state within the State of Iowa, in the original package, was an infringement upon the power of Congress. After considering former decisions of the court, the court said:

> "The conclusion follows that as the grant of the power to regulate commerce among the states so far as one system is required is exclusive, the states cannot exercise that power without the assent of Congress, and in the absence of legislation it is left for the courts to determine when state action does or does not amount to such exercise, or in other words what is or is not a regulation of such commerce."

It is obvious that the prohibition of the sale of a commodity manufactured in another state, as in the case at bar, amounts to a regulation of interstate commerce. Therefore, the principle subsequently stated in the court's opinion applies:

> "Whenever the law of the state amounts essentially to a regulation of commerce with foreign nations or among the states as it does when it inhibits directly or indirectly the receipt of an imported commodity or its disposition before it has ceased to become an article of trade between one state and another, or another country and this it comes in conflict with a power which in this particular has been exclusively vested in the general government, and is therefore void."

The court concluded its opinion as follows:

> "Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the state may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a state the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a state, represented in the state legislature, the power to regulate commercial intercourse between the states, by determining what shall be its subjects, when that power was distinctly granted to be exer-

> cised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create."

Other cases might be considered, such as In re Worthen, 58 Fed. 467, in which an Ohio statute in so far as it prohibited the sale in the original package in Ohio of oleomargarine produced in Illinois was held unconstitutional, and the cases of In re Sanders, 52 Fed. 802, 18 L. R. A. 549, and In re Gooch, 44 Fed. 279, 10 L. R. A. 830, in which the same conclusion was reached concerning a statute of North Carolina prohibiting the sale of seed unless the year in which it was grown was plainly marked on the package, and a statute of Minnesota prohibiting the sale of oleomargarine. They could not, however, add in clearness or force to the controlling principle illustrated in the Schollenberger and Leisy cases, supra; that although a state may prescribe reasonable regulations concerning the quarantine and inspection of articles of commerce imported from another state and sold in the original package, it is absolutely without power to prohibit such sale even where the article is of such a nature as in the case of intoxicating liquors, that if produced within the state its sale might be prohibited. If the Illinois Dairy and Food Law is interpreted in the manner of the trial court in this case, it clearly amounts to a prohibition of the sale within the State of Illinois in the original package of any preservative compound manufactured in other states if it contains the slightest portion of boric acid. If such is the effect of the act it is in palpable violation of the exclusive power to regulate interstate commerce which is vested in Congress, and the act to that extent must be held unconstitutional.

The attempted prohibition of commerce between Illinois and other states in preservatives containing boric acid is the more clearly an infringement upon the power of Congress because by an act entitled:

> "An act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or delerterious foods, drugs, medicines and liquors and for regulating traffic therein and for other purposes,"

known as the Food and Drugs Act, approved June 30, 1906, Congress has legislated upon the subject matter of the Illinois statute, namely, pure food, and also upon the subject of drugs which, although not included within the title of the Illinois statute, is the subject matter of the pending suit. If the Illinois statute does not refer to drugs (and we contend that properly construed it does not), the pending prosecution cannot be sustained because the defendant's product is a drug and not a food. If the Illinois statute, on the other hand, should be construed to prohibit the sale of preservatives imported from other states containing boric acid, then it would be invalid as an infringement upon the power of Congress to regulate interstate commerce, and particularly in conflict with the Act of Congress above cited concerning food and drugs. Section 2 of the act provides:

> "That the introduction into any state or territory or the District of Columbia from any other state or territory or the District of Columbia, or from any other foreign country of any article of food or drug which is adulterated or misbranded within the meaning of this act is hereby prohibited." (34 U. S. St. at Large 771.)

This amounts to a determination by Congress that adulterated foods and drugs shall not be subjects of interstate commerce. Other provisions of the act, especially Section 7, prescribe in detail when food and drugs shall be deemed to be adulterated. It is therefore manifest that the determination by a state of the tests of adulteration of articles which are the subjects of interstate commerce, and the prohibition of the importation of such articles when adulterated according to state standards, are directly in conflict with the power of Congress which has been exercised by legislation upon this subject matter. In such a case the state enactment fails, as it was said by the Supreme Court of the United States in Gulf, Colorado & Santa Fe Railway Co. v. Hefley and Lewis, 158 U. S. 98; 39 L. Ed. 910:

> "It is enough that the two statutes operating upon the same subject matter prescribe different rules. In such case one must yield, and that one is the state law."

To the same effect is State v. Chicago, Milwaukee & St. Paul Ry. Co., 136 Wis. 407; 19 L. R. A. (N. S.) 326, in which it is said of the power vested concurrently in the state and the national government to adopt local regulations of commerce incidental to the police power:

> "But this power in the states is subject to that provision in the Constitution that Congress shall have power to regulate interstate commerce—that is, to prescribe the restrictions and limitations under which it shall be conducted—and, when it prescribes those regulations, it does so to the exclusion of state legislation accomplishing a like regulation directly or indirectly, and whether intended for that purpose or not."

Even, however, if Congress had not legislated in regard to interstate commerce in food and drugs, the Illinois Dairy and Food Law so far as it might be construed to affect such commerce, would still be invalid under the principle laid down by Chief Justice Fuller in the case of Leisy v. Hardin, 135 U. S. 100; 34 L. Ed. 128, that the absence of affirmative enactments by Congress concerning commerce between the states amounts to a determination that such commerce shall be unrestricted. Thus it was said in the opinion:

> "Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the states may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the states cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uiform system, so long as Congress does not pass any law to regulate it, or allowing the states so to do, it thereby indicates its will that such commerce shall be free and untrammeled."

The result is that whether it be thought that under the Food and Drugs Act Congress has legislated on the subject of commerce in preservatives between the states and by defining the standards of adulteration of food and drugs, has authorized the manufacture and sale of such preservatives as are not prohibited there under, or that there is no federal legislation concerning commerce between the states in preservatives, in either event the state statute is powerless to prohibit such commerce. It is either prohibited where deemed harmful by the Food and Drugs Act, in which case the prohibition is enforcible only by the Federal courts, or it is permitted by the Federal Statute. In neither case can such commerce be prohibited or interfered with by the states.

We take the liberty of calling special attention to the decision of the Supreme Court of Illinois in this case in connection with the Interstate Commerce questions herein involved. The Court says:

> "It is further contended that if the act under consideration be construed as we have construed it,—to prohibit the sale of Price's Compound,—it is an infringement upon the power of Congress, to which body is delegated by the constitution the power to regulate commerce among the several states. The power of a State to prohibit within its border the sale of adulterated food is not repugnant to the Commerce Clause of the Federal Constitution, but is valid exercise of the Police Power of the State."

Those words are not applicable to the case at bar for the reason that so far as the Laws of the United States are concerned, Price's Canning Compound is not "adulterated." The only proof of any adulteration in this case is the declaration of the Illinois Statute. Query: Is the declaration of a State Law that a certain substance is harmful, binding upon and capable of limiting the Laws of the United States? The answer is simple and negative. Any State could nullify the effect of any National Law if National Laws were bound by the declarations of State Laws. In the case at bar the National Law requires proof of adulteration before a thing should be deemed adulterated and under the ban of the Law. There was no such proof in this case. Congress has seen fit to legislate upon the subjects herein considered, and this Court has recently passed very conclusively upon that situation. State legislatures may not either amplify or limit the operation of a National Law.

Grady & McDermott v. State of Wis., 228 U. S. 115.

We take the liberty of referring again to the decision of the Illinois Court in connection with the original package doctrine under United States Laws. The Court refers to Austin v. Tenn., 179 U. S. 342. That decision does not apply to the case at bar at all. There were some suggestions in the Brief of the State with reference to "retail sales" and "small packages," but we call the Court's attention to the admitted facts in the case. See Transcript of Record, page 17, folio 29: "Price Canning Compound mentioned in the statement of claim is an article of commerce, sold in Illinois in the original package, manufactured and made in Minnesota." That constitutes all of the evidence in this case on that subject, and we therefore submit that any question of "retail" or "wholesale" is not to be considered, and the decisions from which we have quoted are the ones applicable to this case and not the case of Austin v. Tennessee, cited by the Illinois Court.

CONCLUSION.

For the foregoing reasons, then, we submit the following propositions:

1st. That under a valid interpretation of the Illinois Dairy and Food Law the sale of a harmless Preservative is not prohibited merely because it contains Boric Acid for the reason that Sections 8 and 22 should not be construed together, and if not so construed, then proof would be required of the harmfulness of our Preservative to sustain the judgment of the State.

2nd. That if in construing the two Sections together the effect of the Statute is such that it prohibits the sale of a harmless Preservative solely because it contains Boric Acid, it is in violation of property rights, and therefore invalid under the Constitution of the United States.

3rd. That it is not for the State of Illinois to determine whether commerce between the States, in Preservatives containing Boric Acid, shall be permitted or on what terms; that the declaration of the State of Illinois that Boric Acid is harmful is not binding upon Interstate Commerce or upon Congress, and in fact, is an unwarranted interference with the rights and power of Congress upon that subject.

The first two reasons above stated suggest a fundamental principle which should govern all legislation on the subject of commerce, whether within the States or without them. It is this: That the declaration that articles of commerce are injurious without knowledge of the facts, or contrary to the facts, is tyranny, and that although the presumption is in favor of the reasonableness of legislative acts, yet if an individual who is injured, questions the legislative finding, he should have his day in Court to prove his contentions. A day in Court implied the opportunity to produce evidence in his defense and to be protected in the conduct of his business, if by his evidence he proves his contention. In the case at bar the Defendant was not permitted to introduce any evidence to prove that his business was legitimate and harmless. His business should be presumed legitimate and harmless until the State proves to the contrary.

The third of the statements above made in our Conclusions seems in any event to be conclusive against the conviction in the pending case which is on account of a transaction of Interstate Commerce.

We submit that the judgment and conviction should be reversed and Plaintiff in Error set at liberty.

Respectfully submitted,

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APR 6 1915
JAMES D. MAHE

IN THE

Supreme Court

OF THE

UNITED STATES.

April Term, A. D. 1915.

No. 274.

W. T. PRICE,
Plaintiff in Error,
v.
THE PEOPLE OF THE STATE OF
ILLINOIS.

In Error to the Supreme Court of the State of Illinois.

FILED OCTOBER 13, 1913.
(23,895)

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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IN THE

Supreme Court

OF THE

UNITED STATES.

April Term, A. D. 1915.

No. 274.

W. T. PRICE, *Plaintiff in Error,* v. THE PEOPLE OF THE STATE OF ILLINOIS.	*In Error to the Supreme Court of the State of Illinois.*

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

This is a writ of error to the Supreme Court of the State of Illinois to review the judgment of that Court affirming a judgment rendered by the Municipal Court of Chicago against W. T. Price, plaintiff in error, for a fine of $50 and costs for a violation of the Illinois Dairy and Food Law, found in chapter 127b, Hurd's Revised Statutes. A statement of the proceedings appears in the brief of plaintiff in error on pages 1 to 12.

The present Illinois Dairy and Food Law was passed in 1907. (Laws of Illinois, 1907, page 543.) It declares that for the purposes of the Act formaldehyde, hydrofluoric acid, boric acid, salicylic acid, and all compounds and derivatives thereof are unwholesome and injurious.

The conviction was had for selling in Illinois a package of preservative known as Mrs. Price's Canning Compound, which contained boric acid.

In the conclusion of the statement of plaintiff in error, on page 12, he submits his contentions in two paragraphs, as follows:

> "First. If the Act prohibits the sale of defendant's compound merely because it contains boric acid, without proof that it is harmful, it contravenes section 1 of the Fourteenth Amendment of the Constitution of the United States, to the effect that no person shall be deprived of liberty or property without due process of law.
>
> "Second. In so far as the Act purports to prohibit the sale in Illinois in original packages of a preservative manufactured in another state, it encroaches upon the exclusive power of Congress to regulate commerce among the states."

He further states, on page 13, that the questions raised in this Court are:

> "First. Is the sale of a harmless preservative in the State of Illinois prohibited by the Dairy and Food Law merely because it contains boric acid?
>
> "And if such is the effect of the statute, is so much of it constitutional?
>
> "Second. Can the State of Illinois in any event prohibit the sale of a harmless preservative manufactured in another state and sold in Illinois in the original package, even if the Legislature has declared that the preservative is harmful because it contains boric acid?"

It is contended on behalf of the State that sections 8 and 22 of the Dairy and Food Law of Illinois, when construed together, declare boric acid an unwholesome and injurious preservative, and forbid the sale within the State of Illinois of any mixture or compound thereof intended as a preservative of any food. (Hurd's Revised Statutes, 1913, chapter 127b, sections 8 and 22, pages 2324 and 2329.)

Section 8 is as follows:

> "§ 8. DEFINES ADULTERATION.] That for the purpose of this Act an article shall be deemed to be adultered: In case of confectionery—
>
> "First—If it contains terra alba, barytes, talc, chrome yellow, paraffin, mineral fillers, or poisonous mineral substances, or poisonous color or flavor.
>
> "Second—If it contains any ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug.
>
> "In case of food:
>
> "First—If any substance has been mixed or packed with it so as to reduce or lower or injuriously affect its quality, strength or purity.
>
> "Second—If any substance has been substituted wholly or in part for the article.
>
> "Third—If any valuable constituent of the article has been wholly or in part abstracted: *Provided,* that in the manufacture of skim or separated cheese the whole or a part of the butter fats in the milk may be abstracted.
>
> "Fourth—If it be mixed, colored, powdered, coated, polished, or stained in any manner whereby damage or inferiority is concealed, or it is made to appear better or of greater value than it really is.
>
> "Fifth—If it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided,* that when in the preparation of food products for shipment they are preserved by an external application, applied in such a manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservatives shall be printed on the

covering of the package, the provisions of this Act shall be construed as applying only when such products are ready for consumption; and formaldehyde, hydrofluoric acid, boric acid, salicylic acid, and all compounds and derivatives thereof are hereby declared unwholesome and injurious.

"Sixth—If it consists in whole or in part of a filthy, decomposed or putrid, infected, tainted, or rotten animal or vegetable substance or article, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter."

Section 22 is as follows:

"§ 22. SALE OF PRESERVATIVES PROHIBITED.] No person, firm or corporation shall manufacture for sale, advertise, offer or expose for sale, or sell, any mixture or compound intended for use as a preservative or other adulterant of milk, cream, butter, or cheese, nor shall he manufacture for sale, advertise, offer or expose for sale, or sell any unwholesome or injurious preservative or any mixture or compound thereof intended as a preservative of any food: *Provided, however,* that this section shall not apply to pure salt added to butter and cheese."

BRIEF.

THE ILLINOIS DAIRY AND FOOD ACT.

I.

The twenty-second section of the Illinois Dairy and Food Act provides that no person shall sell any unwholesome or injurious preservative or any mixture or compound thereof intended as a preservative of any food.

Hurd's Rev. Stat., 1913, ch. 127b, par. 22.

The eighth section of the same Act provides that for the purpose of the Act boric acid is declared unwholesome and injurious.

Hurd's Rev. Stat., 1913, ch. 127b, par. 8, item 5.

II.

The Supreme Court of the State of Illinois has construed this Act to mean that the sale of a compound containing boric acid is prohibited when the compound is to be used to preserve fruits and vegetables, and that a compound cannot be sold in Illinois for use in food as a preservative which contains boric acid.

People v. *Price,* 257 Ill., 587, 593.

III.

The construction put upon a statute by the highest Court of the State must be accepted by the Courts of the United States and be regarded by them as a part of the provision when they are called upon to determine whether it violates any right secured by the Federal Constitution.

Lindsley v. *Natural Carbonic Acid Co.,* 220 U. S., 61, 73;

W. W. Cargill Co. v. *Minnesota,* 180 U. S., 452, 466;
Morley v. *Lake Shore Ry. Co.,* 146 U. S., 162, 166;
Olsen v. *Smith,* 195 U. S., 332, 342;
Purity Extract Co. v. *Lynch,* 226 U. S., 192, 198.

THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

IV.

The Fourteenth Amendment to the Federal Constitution was not designed to interfere with the exercise of the police power by the State for the protection of health, the prevention of fraud, and the preservation of public morals.

Powell v. *Pennsylvania,* 127 U. S., 678;
Hammond Packing Co. v. *Montana,* 233 U. S., 331;
Purity Extract Co. v. *Lynch,* 226 U. S., 192;
Silz v. *Hesterberg,* 211 U. S., 31;
Booth v. *Illinois,* 184 U. S., 425;
Schmidinger v. *Chicago,* 226 U. S., 578, 588;
Adams v. *Milwaukee,* 228 U. S., 572, 582;
Barrett v. *Indiana,* 229 U. S., 26, 29;
Sturgis & Burn v. *Beauchamp,* 231 U. S., 320, 325;
Plumley v. *Massachusetts,* 155 U. S., 461;
Schollenberger v. *Pennsylvania,* 171 U. S., 1.

V.

In the exercise of the police powers of the State the Legislature may forbid the sale of a compound which contains boric acid to be used in food, unless the Court can say, from facts of which the Court must take judicial cognizance, that boric acid has, in fact, no real or substantial relation to the subject of health. That is to say, unless the Court can say that boric acid is so universally conceded to be wholesome that it will take judicial notice of that fact.

Powell v. *Pennsylvania,* 127 U. S., 678, 684;
Hammond Packing Co. v. *Montana,* 233 U. S., 331, 333;
State v. *Layton,* 160 Mo., 474, 481;
Adams v. *Milwaukee,* 144 Wis., 371;
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People v. *Cippirly,* 101 N. Y., 634;
State of Iowa v. *Schlenker,* 112 Ia., 642;
Purity Extract Co. v. *Lynch,* 226 U. S., 192;
City of St. Louis v. *Schuler,* 190 Mo., 524;
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State v. *Earl,* 152 Mo. App., 235;
Curtice Bros. Co. v. *Barnard,* 209 Fed. Rep., 589;
Smith v. *Alpine,* 150 N. Car., 425;
Commonwealth v. *Pflaum,* 236 Pa. St., 294;
State v. *Armour Packing Co.,* 124 Ia., 323;
People v. *Rotter,* 131 Mich., 250;
Wright v. *State,* 88 Md., 436.

VI.

The courts cannot take judicial notice that boric acid is wholesome. On the contrary, there are many authorities to the effect that it is a deleterious ingredient and unwholesome and injurious.

Hipolite Egg Co. v. *U. S.,* 220 U. S., 45;
United States Department of Agriculture, Bureau of Chemistry, Circular No. 15, March 21, 1905, pages 1-5 and 23-27 (Bulletin No. 84, Part I);
United States Department of Agriculture, Food Inspection Decision No. 76, issued July 13, 1907, pages 1, 5 and 6;
Foods and Their Adulteration, by Dr. Harvey W. Wiley, page 37;
The Dispensatory of the United States of America, 17th ed., page 37;
Digest of Comments on the Pharmacopœia of the United States of America for the year ending December 31, 1912, published in 1914 by the Treasury Department of the United States Public Health Service, page 148;

United States Department of Agriculture Service and Regulatory Announcements, issued December 31, 1914, page 1, No. 27;
5 Burdon's Dig. Stat. Law of Pa., sec. 10, par. 5, page 5206, and sec. 32, page 5210.

THE INTERSTATE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

VII.

The power of the State to prohibit the sale of adulterated foods within its borders is not repugnant to the commerce clause of the Federal Constitution, but is a valid exercise of its police powers.

Plumley v. *Massachusetts,* 155 U. S., 461;
Schollenberger v. *Pennsylvania,* 171 U. S., 1;
Crossman v. *Lurman,* 192 U. S., 189.

VIII.

A police measure, otherwise within the constitutional powers of the State, will not be held unconstitutional under the commerce clause of the Federal Constitution because it incidentally and remotely affects interstate commerce.

Silz v. *Hesterberg,* 211 U. S., 31, 42;
Savage v. *Jones,* 225 U. S., 501, 525;
Plumley v. *Massachusetts,* 155 U. S., 461;
Patapsco Guano Co. v. *N. Car.,* 171 U. S., 345, 361;
Sherlock v. *Alling,* 93 U. S., 99, 103;
Minnesota Rate Cases, 230 U. S., 352, 408.

IX.

Plaintiff is not protected in the sale of preservatives under the doctrine of the original package decisions of the Supreme Court of the United States. That doctrine does not apply to sales in packages of a size to suit the convenience of local consumers.

Austin v. *Tennessee,* 179 U. S., 343, 356;
Cook v. *Marshall County,* 196 U. S., 261;
Purity Extract Co. v. *Lynch,* 226 U. S., 192.

THE FEDERAL FOOD AND DRUG ACT.

X.

A state is authorized under its police power to enact health laws, notwithstanding there is a Federal Act or regulation upon the same subject.

Hemenway on Public Health, § 249;
Jacobson v. *Massachusetts,* 197 U. S., 11, 25.

ARGUMENT.

THE ILLINOIS DAIRY AND FOOD ACT.

I.

One of the primary contentions of plaintiff in error is that sections 8 and 22 of the Illinois Dairy and Food Act should not be construed together; that section 22 relates solely to preservatives and that section 8 relates solely to adulteration of confectionery and food by added poisonous ingredients; that Price's Canning Compound is not a food, and that, although it is a preservative containing boric acid, the boric acid is not an added ingredient and, therefore, is not prohibited by the Act. To sustain this contention section 8 is construed as though it read: That, for the purpose of this Act, an article shall be deemed to be adulterated if it contains boric acid or other added poisonous ingredients. (Brief for plaintiff in error, pages 20-23, 46.)

Our contention is that the use of the words "boric acid" does not occur in the clause defining adulteration and that the statute should be construed to mean that for the purpose of this Act an article shall be deemed to be adulterated if it contains an added poisonous ingredient, provided that external preservatives necessarily removed mechanically shall not be included in the Act; and formaldehyde, hydrofluoric acid, boric acid, and salicylic acid, and all compounds and derivatives thereof, are hereby (for the purpose of this 'Act) declared unwholesome and injurious. The latter construction is borne out by the language and formation of the paragraph. (1) The declaration that boric acid shall be deemed injurious does not occur in the clause defining adulteration, but is separated from that clause by a colon and, again, by a semicolon; (2) section 8 has to do with preservatives as well as adulteration of foods; (3) the use of the word "and" indicates a relation back, as though the clause read: *And, provided,* for the purpose of this Act, the use of boric acid (either as an adulteration or as a preservative) is declared unwholesome and injurious; (4) the declarations of section 8 are for the purposes of the *Act,* and not for the purposes of that particular *section.* However, the argument is unnecessary, as the construction placed upon it by the Supreme Court of Illinois will be accepted for the purpose of this hearing.

II.

The Supreme Court of Illinois has construed the Act to prohibit the sale of a food preservative containing boric acid.

In the case at bar the Supreme Court of the State of Illinois held that sections 8 and 22 of the Illinois Dairy and Food Act are parts of one Act and should be construed together to give effect to its manifest purpose and intent; that its manifest purpose was to protect the public health by preventing adulteration of food by any unwholesome and injurious ingredient; that it was well known to the Legislature that various compounds are manufactured and sold for preserving foods; that if such preservatives contain unwholesome and injurious ingredients, their use by the housewife, or any one else, in preserving foods would be as injurious to the health as if they had been added by a dealer or manufacturer in preserving foods before placing them on the market; that the object of the Act is to protect the public health by preventing dealers from selling food to which has been added, for the purpose of preserving it, ingredients injurious to the health, or from *selling any compound as a preservative which contained any such ingredients.* The Court added:

> "We think the reasonable construction of the Act to be that the prohibition against boric acid is not limited to foods to which it is an added ingredient, but extends to compounds sold as a food preservative which contain boric acid. The danger to health is as great from one as the other, and the prohibition of both was necessary to effect the evident purpose of the Legislature."
>
> Printed Transcript of Record, pages 28, 29;
> *The People* v. *Price,* 257 Ill., 587, 592, 593.

III.

Plaintiff in error cannot now be heard to say that this construction of the statute is wrong.

The construction put upon the statute by the highest Court of the State must be accepted by the Courts of the United States and be regarded by them as a part of the statute when they are called upon to determine whether it violates any rights secured by the Federal Constitution. (*Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S., 61, 73.)

In *Purity Extract Co.* v. *Lynch,* 226 U. S., 192, the action was for breach of a contract made in Tennessee, in which the defendant agreed to sell in Mississippi a beverage called "Poinsetta." The defense was that the defendant, on coming to Mississippi, found that it was unlawful to sell Poinsetta in that state. The trial court sustained the defense, and its judgment was affirmed by the Supreme Court of the State of Mississippi. The statute which this contract was held to violate prohibited the sale of malt liquors. By an agreed state of facts it was shown that Poinsetta consisted of 90.45% water and 9.55% solids in an unfermented state, which were wholesome and nutritious; that it contained 5.73% malt, but no alcohol, and was not intoxicating and could not be employed as a subterfuge for the sale of beer, and that the United States government did not treat Poinsetta as within the class of intoxicating liquors.

The case was brought for review before this Court, and the judgment of the Supreme Court of the State of Mississippi was affirmed. This Court said, on page 198:

> "The state court, following its decision in *Fuller v. City of Jackson*, 97 Mississippi, 237, construed the statute as prohibiting the sale of all malt liquors, whether in fact intoxicating or not, and this construction of the state law is binding here. The court said: 'Poinsetta may or may not be an intoxicant, but it is a malt liquor, and as such is prohibited from being sold in this state. The prohibition law cannot be made effective unless it excludes all subterfuges.' "

To the same effect are *W. W. Cargill* v. *Minnesota*, 180 U. S., 452; *Olsen* v. *Smith*, 195 U. S., 332, and other cases.

It must, therefore, be conceded that the Illinois Dairy Law prohibits the sale of compounds sold as a food preservative which contain boric acid.

The stipulation of facts in this case states that the defendant, on or about August 30, 1911, at Chicago, Illinois, offered for sale and sold two packages of a preservative known as "Mrs. Price's Canning Compound," and that such preservative contained boric acid. (Printed Transcript of Record, page 9.)

Defendant, therefore, must stand convicted unless the Illinois Dairy and Food Act, as construed in this case, contravenes the Federal Constitution.

IV.

Plaintiff in error contends that the Illinois Dairy and Food Act contravenes Section 1 of the Fourteenth Amendment of the Constitution of the United States to the effect that no person shall be deprived of liberty or property without due process of law.

The Fourteenth Amendment to the Federal Constitution was not designed to interfere with the exercise of the police powers by the state for the protection of health, the prevention of fraud, and the preservation of public morals.

In the exercise of police powers the State may declare that the use of boric acid in food is unwholesome and injurious and forbid the sale of a compound which contains boric acid to be used in food as a preservative. This is emphatically denied by plaintiff in error (brief, pp. 24-40) and is, perhaps, the principal contention in his brief. He contends: "The Legislature cannot destroy rights of liberty or property by legislative declaration which is contrary to fact." And cites in support thereof *People* v. *Economy Light & Power Co.*, 241 Ill., 290, and *Horwick* v. *Walker-Gordon Laboratory Co.*, 205 Ill., 497. Neither of these cases had anything to do with the exercise of the police powers of the State.

Plaintiff in error also cites *City of Chicago* v. *Netcher*, 183 Ill., 104, where the Court held an ordinance prohibiting the sale of meat in a department store invalid. An examination of that case will show that the Court held that the city had no charter authority for the exercise of such a power (p. 109). The Court further held that if it is claimed the ordinance is referable to the police power, the Court must be able to see that it tends in some degree toward the prevention of offenses or the preservation of the public health, morals, safety, or welfare; and if it is manifest that the ordinance had no such object, but, under the guise of a police regulation, was an invasion of the property rights of the individual, it is the duty of the Court to declare it void.

However, as the latest expression of the Supreme Court of Illinois is that the Act in question is constitutional, it would seem to be without profit to cite Illinois cases.

Plaintiff in error chiefly relies upon *People* v. *Marx*, 99 N. Y., 377, where it was held that a statute absolutely prohibiting the manufacture and sale of oleomargarine was void, and *People* v. *Biesecker*, 169 N. Y., 53, which is claimed to be strikingly similar to the case at bar. (plaintiff's in error brief, pp. 30-32.) As the latter case is emphasized and quoted from at considerable length, we deem it proper to call particular attention to this case. It was an action brought to recover the penalty for violation of the New York Agricultural Law, which provided that:

> "No person shall sell, offer or expose for sale, any butter or other dairy products containing a pre-

> servative, but this shall not be construed to prohibit the use of salt in butter or cheese, or spirituous liquors in club, or other fancy cheese, or sugar in condensed milk."

The defendant advertised for sale a preservative called "preservaline," for use with butter, which was neither salt nor sugar nor liquor.

The prohibition was held to be void, not only on the ground that the Agricultural Law did not prohibit the adulteration of butter and cheese, but also on the ground that there was no legislative determination that preservatives other than salt and sugar are unwholesome in the preservation of dairy products. The Court called attention to the case of *People* v. *Marx,* 99 N. Y., 377, which held that a statute absolutely prohibiting the manufacture and sale of oleomargarine was void; the case of *People* v. *Arensberg,* 105 N. Y., 123, which upheld the statute after it had been amended so as to prohibit the manufacture or sale of any article so compounded as to imitate butter; the case of *People* v. *Kilber,* 106 N. Y., 321, which upheld the statute, defining what should be deemed unwholesome or adulterated milk, and prohibiting its sale; the case of *People* v. *Girard,* 145 N. Y., 105, which held valid a statute prohibiting the sale or manufacture of vinegar containing any artificial coloring matter. From these cases the Court deduced the following propositions:

> "(1) That the legislature cannot forbid or wholly prevent the sale of a wholesome article of food.
>
> "(2) That legislation intended and reasonably adapted to prevent an article being manufactured in imitation or semblance of a well known article in

> common use, and thus imposing upon consumers or purchasers, is valid.
>
> "(3) That in the interest of public health the legislature may declare articles of food not complying with a specified standard unwholesome, and forbid their sale."

The Court then calls attention to the conflict between the first and third propositions, and states that in the first of the *Milk Cases* it was held that the statutory declaration of what was wholesome milk was conclusive, and the defendant was not allowed to show in defense that the milk sold by him was, in fact, unadulterated and not unwholesome, and that the *Marx case* can be differentiated on the ground that the statute forbade its sale as a substitute to take the place of butter, and not as an unwholesome article of food. We find no fault with these conclusions of the Court.

The Court of Appeals, in the recent case of *People* v. *Von Kampen,* 210 N. Y., 381, affirmed a judgment of the Municipal Court of the city of New York in favor of the plaintiff in an action to recover the penalty for violation of section 41 of the Agricultural Law. The defendant sold a one-pound print of oleomargarine, which was properly wrapped, sealed, and labeled. The violation consisted of giving with the purchase a capsule of coloring matter, which was conceded to be a harmless vegetable compound.

In 1909 section 41 had been amended by adding thereto:

> "And no person selling any oleaginous substance not made from pure milk or cream of the same as a substitute for butter shall sell, give away, or deliver with such substance any coloring matter. * * *"

This language was assailed as violative of the constitutional rights of the defendant to sell two legitimate products, oleomargarine and coloring matter.

The Court of Appeals of New York said:

> "Had color been added to the oleomargarine in Illinois shipped to this state and sold from the original package, such sale would be a violation of the statute of this state. (*Plumley* v. *Massachusetts,* 155 U. S., 461, 472, 478.) In the *Plumley* case Mr. Justice Harlan wrote: 'If there be any subject over which it would seem the states ought to have plenary control and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. * * * We are of opinion that it is within the power of a state to exclude from its markets any compound manufactured in another state which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The Constitution of the United States does not secure to any one the privilege of defrauding the public.' "

In this case the Court also considered the argument made by plaintiff in error, on page 32, that boric acid is a drug which may be procured of any druggist, and that the Illinois Act therefore denies plaintiff in error the equal protection of the laws. On that subject the Court of New York, in the *Von Kampen case, supra,* said:

> "The argument that the purchaser of oleomargarine may secure coloring matter in a drug store or at a time other than the time of purchase of oleomargarine, does not militate against the validity of a statute having in view the prevention of crime. Coloring matter purchased generally in the market may be pure and harmless or poisonous or hurtful. How is the purchaser of the same to know whether

> it is harmless or hurtful? That a dealer may sell or give away coloring matter at a time other than at a time when a sale of oleomargarine is made without violating the statute does not determine the question of the power of the state to prohibit the gift or sale of the same product when a sale of oleomargarine is actually made."

The conclusion of the Court was that the legislation in question was within the police powers of the state.

Whatever may be the rule in New York, it is well settled in the United States Courts that a state may, under its police powers, absolutely forbid the sale of a wholesome food, such as oleomargarine, considering the question apart from the subject of interstate commerce.

In *Powell* v. *Pennsylvania*, 127 U. S., 678, the Pennsylvania Act of 1885, forbidding any person to manufacture, sell, or offer for sale any oleaginous substance as an article of food was in question. It was agreed that the defendant sold a package of oleomargarine; that the article was pure and wholesome, containing the same elements as dairy butter, the only difference between them being that the manufactured article contained a smaller proportion of the fatty substance known as butterine. The defendant offered to prove that he was engaged in business and had in stock prior to the enactment of the law a large quantity of the article in question, and that he had invested in a factory for its manufacture a large amount of money, which the enforcement of the Act in question would cause to be lost. This was held to be immaterial and the defendant found guilty. This Court held that whether the manufacture of oleomargarine involved such danger to the public health as to require the entire suppression of the business, rather than its regulation, are questions of fact and public policy which belong to the legislative department, and that it is no part of the functions of the courts to conduct investigations as to the facts entering into questions of public policy merely; that the Court must presume that the legislature of Pennsylvania, upon the fullest investigation and upon reasonable grounds, determined that the prohibition of the sale of oleomargarine would promote the public health, and that if such legislature is unwise, the appeal must be to the legislature, and not to the judiciary; that the objection that the statute is repugnant to the Fourteenth Amendment of the Federal Constitution is untenable and without merit.

In the *Powell case* the question of interstate commerce was not involved, but that question was raised in *Plumley* v. *Massachusetts,* 155 U. S., 461. The Massachusetts statute prohibited the manufacture or sale of oleomargarine "which shall be an imitation of yellow butter." The defendant was found guilty of selling such oleomargarine, notwithstanding the same was manufactured in Illinois, shipped to Massachusetts and sold in the original package. In a carefully considered opinion by a divided court the doctrines announced in the *Powell case* were affirmed and applied, and the Court held that the Massachusetts Act was constitutional and not in conflict with the commerce clause of the Federal Constitution.

In *Schollenberger* v. *Pennsylvania,* 171 U. S., 1, it was held that a Pennsylvania Act which forbade the sale of any oleaginous substance was invalid to the extent that it prohibited the introduction of oleomargarine from another state and its sale in the original package.

In *Silz* v. *Hesterberg,* 211 U. S., 31, the Court had before it an Act of the state of New York which forbade any person to have in his possession game during the closed season. The Court held the Act a valid police measure and not in conflict with the Federal Constitution, either as depriving persons importing game of their property under due process, or as an interference with, or a regulation of, interstate commerce. This opinion refers both to *Schollenberger's case* and to *Plumley's case* and adheres to *Plumley's case.*

Perhaps the latest expression of this Court on this subject is found in *Hammond Packing Co.* v. *Montana,* 233 U. S., 331. This was an action to recover a license tax of 1 cent per pound for selling oleomargarine. The Court said:

> "Apart from interference with commerce among the states, a state may restrict the manufacture of oleomargarine in a way in which it does not hamper that of butter. (*Capital City Dairy Co.* v. *Ohio,* 183 U. S., 245, 246.) It even may forbid the manufacture altogether. (*Powell* v. *Pennsylvania,* 127 U. S., 678.) It may express and carry out its policy as well in a revenue as in a police law. (*Quong Wing* v. *Kirkendall,* 223 U. S., 59, 62.) The case really has been disposed of by previous decisions of this Court. (*McCray* v. *United States,* 195 U. S., 27, 62, 63.) Judgment affirmed."

The latter case held that the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights.

From these cases it appears that it is within the police powers of the State to forbid the sale of an article of food, even though the same is wholesome, and that such a statute is not in contravention of the Fourteenth Amendment to the Federal Constitution, and that it is not in contravention of the interstate commerce clause, where such prohibition incidentally and remotely affects interstate commerce.

V.

The Legislature may forbid the sale of a compound which contains boric acid to be used in food unless the Court can say that boric acid is so universally conceded to be wholesome that the Court will take judicial notice of that fact.

This is practically the language used by the Supreme Court of Missouri in *State* v. *Layton,* 160 Mo., 474. In that case defendant was prosecuted under a statute which forbade the sale of baking powder containing alum. Defendant offered to prove that alum was not harmful to health, but the offer was refused. The Court held that if there is any dispute as to the fact as to whether an article is wholesome for food or drink, then the legislature can either regulate or prohibit it, and the constitutionality of the law is not to be determined upon the question of fact in each case, but the courts determine for themselves upon the fundamental principles of the Constitution which vests the legislative power in the general assembly, and that an act of the legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt. This case was appealed to the Supreme Court of the United States, where the writ of error was dismissed because the Supreme Court of Missouri had declined to pass upon the federal question, because that question was not raised in the trial court, as required by the state practice. (*Layton* v. *Missouri,* 187 U. S, 356.)

In *City of St. Louis* v. *Schuler,* 190 Mo., 524, defendant was convicted under an ordinance prohibiting the sale of milk containing any preservative. The evidence showed a small quantity of formaldehyde, sufficient to preserve the milk from souring, but not injurious to health. It was contended that the legislature could not forbid or wholly prevent the sale of a wholesome article of food, and that the preservative was not used to deceive, but to increase the value of the food. The Court held the Act constitutional and sustained the conviction.

In *City of St. Louis* v. *Grafeman Dairy Co.,* 190 Mo., 492, 507, the Court held that the law may prohibit the sale of food, unless it meets the requirements of a particular test provided by the statute, even though the food be wholesome and not adulterated.

In *State* v. *Earl,* 152 Mo. App., 235, the Court held that the legislature was within its police powers in absolutely prohibiting the coloring or flavoring of vinegar, although such added matter was harmless.

In *Adams* v. *Milwaukee,* 144 Wis., 371, the city of Milwaukee had passed an ordinance which forbade the sale of milk from cows outside of the city not tuberculin tested. The Court said:

> "When there are conflicting scientific beliefs or theories in such matters, it is for the city council to determine upon which theory it will base its police regulations, and unless it is clearly and manifestly

> wrong, it is not for the court to interfere on the ground that the scientific theory on which the ordinance is based is incorrect or unsound. This case was affirmed in the Supreme Court of the United States. (*Adams* v. *Milwaukee,* 228 U. S., 572.)"

In *Sanders* v. *Commonwealth,* 117 Ky., 1, the statute forbade the sale of milk from animals fed upon "still slop." Upon a conviction obtained under this law an appeal was taken to the Supreme Court. It was contended that when used under proper sanitary conditions "still slop" was a wholesome food for dairy cows, but the Court held the Act was a valid exercise of the police powers, and not in contravention of the Federal Constitution.

In the *State of Iowa* v. *Schlenker,* 112 Iowa, 642, defendant was charged with having treated milk with boric acid in hot water, in violation of a statute prohibiting the addition of water or any other substance to milk. It was contended that such adulteration did not render the milk harmful, but the Court held that that was not a question for the jury, but the question was whether the terms of the statute had been violated. The statute was held constitutional.

In *Curtice Bros. Co.* v. *Barnard,* 209 Fed. Rep., 589 (Cir. Ct. of App., 7th Cir.), Curtice Brothers filed a bill to enjoin the Food and Drug Commission and the State Board of Health of Indiana from prosecuting those who sold complainants' goods containing benzoate of soda. The Indiana statute provided that an article should be deemed adulterated if it contained any antiseptic or preservative substance except common salt, salt peter, cane sugar, vinegar, spices or other harmless preservative, the use of which is authorized by the State Board of Health. The board adopted a rule prohibiting the use of benzoate of soda as a food preservative. The Circuit Court of Appeals held that as the question of the harmlessness of benzoate of soda is an open one in the scientific world, it was within the power of the Legislature to prohibit its use in the preparation of foods.

Smith v. *Alpine,* 150 N. C. 425, was an action to recover back the price paid for a preservative of food containing sulphur, as the statute prohibited its use. The court said:

> "The legislature had the constitutional right to enact the statute, but its judgment as to the laws of chemistry may be incorrect and the article not deleterious. If so, while the seller could not recover the purchase price, the buyer cannot recover it back."

In *Commonwealth* v. *Pflaum,* 236 Pa. St. 294, defendant was convicted of using sulphur dioxide in confectionery. The court said:

> "The legislature has declared that sulphur dioxide is deleterious to health and has forbidden its use in confectionery. We must assume that this determination was reached after full examination and on reasonable grounds, and that in the judgment of a body having control of the subject, such prohibition was necessary to promote the public health."

The doctrine contended for was also stated by Mr. Justice Harlan in *Powell* v. *Pennsylvania,* 127 U. S. 678, 684, as follows:

> "As it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts . It is not a part of their functions to conduct investigations of facts entering into questions of public policy

> merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions."

We therefore say that the law is well settled that unless boric acid is so universally conceded to be wholesome that the courts will take judicial notice of that fact, the legislative declaration forbidding its use in food must be held constitutional.

VI.

Boric acid is not conceded to be wholesome, but is generally considered to be unwholesome.

If it does not appear upon the face of the statute, or from any facts of which the Court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the Court. (*Powell* v. *Penn.*, 127 U. S. 678, 685.)

There remains to be considered whether this Court must take judicial cognizance that boric acid is wholesome when used in food. The issue is not whether boric acid is wholesome in food, but whether it is so universally conceded to be wholesome that there is no controversy about it.

We contend that there is a controversy and a great weight of authority that boric acid is injurious to health.

In *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, this court sustained a confiscation and judgment for costs under the Federal Pure Food and Drug Act of June 30, 1906, for using boric acid in the preservation of eggs. The United States instituted libel proceedings against fifty cans of preserved eggs, prepared by the Hipolite Egg Co. of St. Louis, Mo. The eggs were the property of Thomas & Clark, an Illinois corporation engaged in the bakery business at Peoria, Ill., and were to be used for baking purposes. The court below found that each can contained approximately two per cent of boric acid; that it was a deleterious ingredient and that the eggs were adulterated within the meaning of the Food and Drugs Act and condemned the same. This court said: "We are dealing, it must be remembered, with illicit articles—articles which the law seeks to keep out of commerce, because they are debased by adulteration." The decree below was affirmed.

The Federal Government itself has taken an important part in this controversy.

Pursuant to authority conferred by Congress, the Secretary of Agriculture of the United States conducted an extensive and scientific investigation of the influence of food preservatives upon health and digestion. The work was directed by the Bureau of Chemistry, and not only were the former methods of artificial digestion and experimentation upon lower animals employed, but experiments were made upon human beings. A number of volunteers were selected, and they were fed varying quantities of boric acid, over different periods of time. The subjects were under the observation of a physician, and detailed observations and examinations were made during the period. At the conclusion of the investigation an elaborate and detailed report was compiled and published as Bulletin No. 84 of the Bureau of Chemistry. A condensed form of the bulletin was issued by the Department of Agriculture June 23, 1904, as Circular No. 15 of the Bureau of Chemistry. We quote the following from the conclusion reached concerning the effect of boric acid and borax upon general health, (page 26):

> "The most interesting of the observations which were made during the progress of the experiments was in the study of the direct effect of boric acid and borax, when administered in food, upon the health and digestion. When boric acid, or its equivalent in borax, is taken into the food in small quantities, not exceeding half a gram (7½ grains) a day, no notable effects are immediately produced. The medical symptoms of the cases in long-continued exhibitions of small doses, or in large doses, extending over a shorter period, show in many instances a manifest tendency to diminish the appetite and to produce a feeling of fullness and uneasiness in the stomach, which in some cases results in nausea, with a very general tendency to produce a sense of fullness in the head, which is often manifested as a dull and persistent headache. In addition to the uneasiness produced in the region of the stomach, there appear in some instances sharp and well-located pains which, however, are not persistent. Although the depression in the weight of the body and some of the other symptoms produced persist in the after periods, there is a uniform tendency manifested after the withdrawal of the preservative toward the removal of the unpleasant sensations in the stomach and head above mentioned.
>
> "The administration of boric acid to the amount of 4 or 5 grams per day, or borax equivalent hereto, continued for some time results in most cases in loss of appetite and inability to perform work of any kind. In many cases the person becomes ill and unfit for duty. Four grams per day may be regarded then as the limit of exhibition beyond which the normal man may not go. The administration of 3 grams per day produced the same symptoms in many cases, although it appeared that a majority of the men under observation were able to take 3 grams a day for a somewhat protracted period and still perform their duties. They commonly felt injurious effects

from the dose, however, and it is certain that the normal man could not long continue to receive 3 grams per day.

"In many cases the same results, though less marked, follow the administration of borax to the extent of 2 grams and even 1 gram per day, although the illness following the administration of borax and boric acid in those proportions may be explained in some cases by other causes, chiefly grippe.

"The administration of borax and boric acid to the extent of one-half gram per day yielded results markedly different from those obtained with larger quantities of the preservatives. This experiment, Series V, conducted as it was for a period of fifty days, was a rather severe test, and it appeared that in some instances a somewhat unfavorable result attended its use. On the whole the results show that one-half gram per day is too much for the normal man to receive regularly. On the other hand it is evident that the normal man can receive one-half gram per day of boric acid, or of borax expressed in terms of boric acid, for a limited period of time without much danger of impairment of health.

"It is, of course, not to be denied that both borax and boric acid are recognized as valuable remedies in medicine. There are certain diseases in which these remedies are regularly prescribed, both for internal and external use. The value which they possess in these cases does not seem to have any relation to their use in the healthy organism, except when properly prescribed as prophylactics. The fact that any remedy is useful in disease does not appear to logically warrant its use at any other time.

"It appears, therefore, that both boric acid and borax, when continuously administered in small doses for a long period, or when given in large quantities for a short period, create disturbances of appetite, of digestion and of health."

This circular had been issued and widely distributed before the passage of the present Dairy and Food Law in 1907, and it is presumed that the Legislature acted only after the fullest and most careful consideration of the subject.

Pursuant to the provisions of the Federal Food and Drug Act, the Department of Agriculture issued a bulletin on July 13, 1907 (known as Food Inspection Decision 76) on the use of dyes, chemicals and preservatives in foods.

Concerning boric acid, it said, (page 5):

> "The classes of substance which have been investigated by the Department of Agriculture include essentially all of the well known preservatives, including such tpyes as boracic acid and borax salicylic acid and its salts, benzoic acid and its salts, sulphurous acid and its salts and formaldehyde.
>
> "The evidence which has been accumulated as the result of all these researches conducted in the Department of Agriculture, as well as the result obtained as the outcome of other researches both in the United States and abroad, points so strongly to the poisonous properties of preservatives that their use as a class should, under the act, be inhibited in food and food products."

Dr. Harvey W. Wiley, late Chief of the Bureau of Chemistry, in his work on "Food and Their Adulteration," says of boric acid as a preservative (page 37):

> "There is no doubt of the fact that the injurious character of borax, even in small quantities, has been fully established, and therefore any amount of testimony to the effect that in individual cases it has not produced injurious results is of no value whatever. * * * No expert would testify that borax has never been injurious—even those who appear in its favor admit that, but plead that it is generally used in small quantities and, therefore, cannot be harmful."

We also quote from Dispensatory of United States (17 ed.) page 37, as follows:

Boric Acid.

> "*Medical Properties and Uses.* The physiological action of boric acid and its salts is a very feeble one, yet severe and even fatal cases of poisoning

> from it have been reported. The symptoms have been great depression of spirits, fall of bodily temperature, a pulse which is either rapid or slow, but always very feeble, nausea, violent vomiting, hiccough, sometimes an erythematous eruption accompanied with much oedematous swelling, ecchymoses, disturbance of respiration, and, very late in the poisoning, coma followed by death. The acid escapes rapidly from the system, and to some extent through all the secretions, but especially by the urine. It has been demonstrated by E. T. Stewart and H. C. Wood to act as a depressant upon the spinal centres, and also to have a depressant influence upon the heart itself.
>
> "Boric acid and its salts are usually poisonous to the lower forms of life, and have considerable antiseptic power, but the experiments of Sternberg and of Andrews have shown that this influence is too feeble to be depended upon against pathogenetic germs. The acid acts upon mucous membranes as a soothing detergent, is nearly free from irritating properties, and is much used as a local application in mucous membrane inflammations, such as *conjunctivitis, aphthou ulceration of the mouth* and even *diphtheria.*"

We quote from Bulletin No. 93, Hygienic Laboratory, April, 1914, published by the U. S. Treasury Department for the U. S. Public Health Service, page 148.

> "*Acidum Boricum.* * * * Sanders, J. Herbert: Boric acid poisoning, published cases.—Brit. M. J. 1912, v. 1, p. 605. See also Vaughan, Harley, p. 832, John H. Aytown, p. 834, and Editorial, Therap. Gaz., 1912, v. 36, p. 700."

On December 26, 1913, the United States Department of Agriculture adopted the plan of having the Bureau of Chemistry issue instructions regarding the Federal Food and Drugs Act, in the form of a monthly bulletin.

In the bulletin issued December 31, 1914, we quote the following:

> "27. *Shrimp preserved with borax or boric acid regarded as adulterated.*

> "The bureau has recently recommended the seizure of a number of shipments of shrimp and prawn in kegs on the ground that they contain boric acid or borax. The addition of these preservatives is regarded as an adulteration within the meaning of the Food and Drugs Act. This notice is issued as a warning to packers against the use of such preservatives in the preparation of these products."

On May 13, 1909, the State of Pennsylvania passed a new act relating to food, and it is a significant fact that in this act, which is one of the latest and one of the most complete, the use of boric acid is prohibited both in food and in drink.

The fifth clause of the tenth section provides that an article of food shall be deemed to be adulterated if it contains any added sulphurous acid, sulphur dioxide or sulphites, benzoate acid or benzoates, except as hereafter provided, or if it contains any added boric acid or borates, salycylic acid or salicylics, formaldehyde, hydrofluoric acid or fluorides, etc. Section 32 provides that a non-alcoholic drink shall be deemed to be adulterated within the meaning of the act if it contains any added boric acid or borates, salyclic acid or salicylics, formaldehyde, sulphurous acid or sulphites, hydrofluoric acid or fluorides, etc. (5 Purdon's Digest of the Stat. Law of Pa., 1910, pp. 5,206 and 5,210.)

It, therefore, is my conclusion that the courts cannot take judicial notice that the use of boric acid in food is wholesome; that the weight of evidence is otherwise; that the most defendant can contend is that there is a controversy as to whether boric acid is injurious and unwholesome, and that the Legislature of Illinois was within the exercise of its police powers when it forbade the use of boric acid in foods as a preservative.

VII.

The power of the State to prohibit the sale of adulterated foods within its borders is not repugnant to the commerce clause of the Federal Constitution, but is a valid exercise of its police powers.

If, then, as we have shown, the addition of boric acid to food constitutes adulteration under the Illinois Drug and Food law, defendant cannot maintain his contention that the law is ivalid as an interference with the interstate commerce laws.

In *Plumley* v. *Massachusetts,* 155 U. S. 461, 472, the court said that if there was any subject over which the states ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products, and that laws of that character are not inconsistent with the power of Congress to regulate commerce between the states; that the assertion that the power of a state to exclude from its limits any compound manufactured in another state which has been adulterated is repugnant to the commerce clause of the Constitution of the United States, is devoid of merit.

In *Crossman* v. *Lurman,* 192 U. S. 189, the court held that the New York law prohibiting the sale of adulterated food and drugs was not repugnant to the commerce clause of the Federal Constitution, but was a valid exercise of the police powers of the state. In that case the buyer refused to accept coffee imported in bags because it had been artificially colored. The graders provided for in the contract of purchase held that, although the coffee had been coated with the wash, its average quality was yet equal to that specified in the contract. The court held that under the New York law the buyer could refuse to accept the coffee and that the New York law would not be held invalid under the interstate commerce laws.

But plaintiff in error probably concedes this point, or while relying upon *Schollenberger* v. *Pennsylvania,* 171 U. S. 1, in quoting from the opinion, the following, on page 37, is a part of plaintiff in error's quotation:

> "In the execution of its police power we admit the right of the state to enact such legislation as it may deem proper, even in regard to articles of interstate commerce, for the purpose of preventing fraud or deception in the sale of any commodity and to the extent that it may be fairly necessary to prevent the introduction or sale of an adulterated article within the limits of the state."

On page 24 of his brief plaintiff in error states his position, emphasized by capitals, as follows:

> "IF THE DAIRY AND FOOD ACT FORBIDS THE SALE WITHIN THE STATE OF ILLINOIS OF ALL PRESERVATIVE COMPOUNDS CONTAINING BORIC ACID, NOTWITHSTANDING THAT THEY ARE WHOLESOME, THE ACT IS UNCONSTITUTIONAL, NULL AND VOID."

His argument, therefore, is based upon the premises that boric acid is concededly wholesome, which premises we have endeavored to show are without foundation.

If, then, it must be conceded that boric acid is an adulteration under the Illinois law, there is nothing more to be said, for a state may prohibit the sale of adulterated foods even though they be imported.

VIII.

Somewhat allied to the principle ennunciated under the head VII is the doctrine that a police measure otherwise within the constitutional power of the State will not be held unconstitutional under the commerce clause of the Federal Constitution because it incidentally and remotely affects interstate commerce.

This principle was applied to the Forest Fish and Game Law of the State of New York of 1900 in *Silz* v. *Hesterberg,* 211 U. S. 31, where it was held that the sections of this law which prohibited the possession of game during the closed season are a valid exercise of the police powers of the state and are not in conflict with the Constitution of the United States either as depriving persons importing game of their property without due process of law, or as an interference with, or a regulation of, interstate commerce.

In support of this doctrine many cases are cited in *Savage* v. *Jones,* 225 U. S. 501. This was a bill for an injunction which alleged that complainant was engaged in Minnesota in the manufacture of medicinal preparations, one of which was called International Stock Food and sold in every state in the Union; that it possessed effective curative properties of various diseases of domestic animals and was composed of medicinal roots, herbs, seeds and barks combined by a secret formula of great value; that the legislature of Indiana had passed an act requiring every package of concentrated commercial feeding stuff to be labeled, stating the minimum percentage of crude, fat, protein, etc.; that the sales were made in Minnesota, delivered to purchasers in Indiana in the original unbroken packages, and that the state chemist of Indiana was threatening to prosecute complainant and his agents for not complying with the law. The court said:

> "The evident purpose of the statute was to prevent fraud and imposition in the sale of food for domestic animals, a matter of great importance to the people of the state. Its requirements were directed to that end and they were not unreasonable. It is not aimed at interstate commerce, but without discrimination sought to promote fair dealing in the described articles of food. * * * The state cannot, under cover of asserting its police powers, undertake what amounts essentially to a regulation of interstate commerce or impose a direct burden upon that commerce. * * * But when the local police regulation has real relation to the suitable protection of the people of the state and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority."

The court cites a large number of cases and quotes with approval from *Plumley* v. *Massachusetts,* 155 U. S. 461, and *Patabsco Guano Co.* v. *North Carolina,* 171 U. S. 345 (524 to 527.) The court concludes, on page 528, as follows:

> "In any view, the effect on that commerce is indirect and incidental, and the Constitution of the United States does not secure to anyone the privilege of defrauding the public."

It is as much fraud on the public to sell an unwholesome food preservative as oleomargarine containing coloring matter.

IX.

Plaintiff in error is not protected in the sale of his preservative under the doctrine of the original package decisions

because, as shown by the stipulation of facts in this case, his packages were of a very small size to suit the convenience of local consumers.

This question was before this Court in *Austin* v. *Tennessee,* 179 U. S. 343, in which Austin was convicted for the sale of cigarettes in violation of an act of the State of Tennessee which prohibited the sale of, or the bringing into the state for the purpose of selling, any cigarettes. The cigarettes in controversy were brought into the state in paper packages 3 inches in length and 1½ inches in width, containing ten cigarettes, unboxed but thrown loosely into baskets. The court held that original packages are such as are used in bona fide transactions carried on between the manufacturer and wholesale dealers residing in different states; that where the size of the package is such as to indicate that it was prepared for the purpose of evading the law of the state to which it is sent, it will not be protected as an original package against the police laws of that state, and that the paper parcels containing ten cigarettes each were not original packages within the meaning of the interstate commerce law. In discussing this question the court said, on page 359:

> "The real question in this case is, whether the size of the package in which the importation is actually made is to govern; or the size of the package in which bona fide transactions are carried on between the manufacturer and wholesale dealer residing in different states. We hold to the latter view. The whole theory of the exemption of the original package from the operation of state laws is based upon the idea that the property is imported in the ordinary form in which, from time to time immemorial, foreign goods have been brought into the country. These have gone at once into the hands of the wholesale dealers who have been in the habit of

> breaking the packages and distributing their contents among the several retail dealers throughout the state. It was with reference to this method of doing business that the doctrine of the exemption of the original package grew up."

This case was followed by *Cook* v. *Marshall County*, 196 U. S. 261, the only difference being that in the latter case no basket was used to hold the many small packages shipped at one and the same time to the one person. This Court adhered to its decision in *Austin* v. *Tennessee*, *supra*, that small paseboard boxes containing ten cigarettes and sealed and stamped with a revenue stamp, whether shipped in a basket or loosely, not boxed, baled or attached together, and not separately or otherwise addressed, are not original packages and are not protected under the commerce clause of the Federal Constitution from regulation by the police power of the state.

In *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, a malt but non-alcoholic beverage called "Poinsetta" was shipped in bottles, each separate and apart from the other, but placed in a case to prevent breakage. The case was not fastened and the bottles were shipped in interstate commerce from one state to another to be sold as each several package. Plaintiff in error contended, among other things, that the interstate commerce law obviated a Mississippi statute which prohibited the sale of malt liquors. Upon this point the court said that the plaintiff in error was not aided by the fact that the shipment was made in bottles, each separate and apart from the other, each bottle constituting an original package, citing *May* v. *New Orleans*, 178 U. S. 343, and *Cook* v. *Marshall County*, 196 U. S. 261. The court added:

> "We are, therefore, not called upon to consider whether or not the Wilson act (August 8, 1890, C. 728; 26 Stat. 313) governs the case of such an article as Poinsetta, and confining ourselves to the issue presented, we express no opinion upon that point."

The Wilson act provided that liquors imported in original packages should be subject to the state laws. The court held, in substance, that it was not necessary to decide whether Poinsetta came within the prohibition of the Wilson act, for the reason that the pretended shipment in original packages would not protect the article when the article was shipped in separate bottles placed in unfastened cases.

Plaintiff in error, therefore, is not protected under the doctrine of the original package decisions of the Supreme Court of the United States if the original packages are of small size to suit the convenience of local consumers and not in packages such as are ordinarily used by manufacturers in shipping to wholesale dealers.

Upon this subject the evidence shows that on the front of the envelope containing the preservative sold were the words:

> "May be used in canning all kinds of food, and is especially valuable for corn, beans, peas, asparagus, tomatoes, etc. May also be used in making catsup, sweet pickles or anything that is liable to ferment. It saves money, time, labor, hurry and insures the best results. See book of directions for instruction in using the compound and how to do all kinds of canning. Book with free sample sent to any address on application. The contents of this package is sufficient for four quarts."

On the back of the envelope appeared the following words:

"Retail price, 1 package 10c, 3 packages 25c, 7 packages 50c, 15 packages $1.00." (Printed Rec. 10.)

On page 16 of his brief plaintiff in error explains a part of the label as follows:

> "The wrapper on the package of the defendant's preservative indicates that the quantity of the compound enclosed is sufficient for use in four quarts of preserved fruit or vegetables. In this proportion it amounts to only one one hundred and twentieth of one per cent (1/120 of 1%) of the finished product—an exceedingly small dose."

It is manifest that the package in question was of small size to suit the convenience of local consumers, the contents of the package being only sufficient for four quarts of fruit or vegetables. Moreover, only a retail price is quoted upon the package indicating that it is to be sold at retail. Moreover, it appears that the preservative was in an envelope and when sold was not in such a package as is ordinarily used by manufacturers in shipping to wholesale dealers.

We, therefore, conclude that under the now well settled rule of this court defendant is not protected under the doctrine of the original package decisions of the court.

X.

The police power is one that the states did not surrender under the Federal Constitution. A state is authorized to enact health laws notwithstanding there is a Federal Act or regulation on the same subject.

The last contention of plaintiff in error is that the prohibition in Illinois of a preservative containing boric acid is clearly an infringement upon the power of Congress because Congress has legislated upon that subject by passing an act known as the Food and Drug Act, approved June 30, 1906, and that Section 7 of the act describes in detail when food shall be deemed adulterated, and the state enactment being in conflict therewith must fail.

This argument is manifestly unsound. As was said in *Jacobson* v. *Massachusetts,* 197 U. S. 11, 25,

> "The authority of the state to enact this statute is to be referred to what is commonly called the police power—a power which the state did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of the power, yet it has distinctly recognized the authority of the state to enact quarantine laws and health laws of every description; indeed, all laws that relate to matters completely within its territory, and which do not by their necessary operation affect the people of other states."

Hemenway in his late work on public health, in Section 249, says:

> "From these and other decisions it is apparent that the power to legislate on matters pertaining directly and solely to the health of the Nation resides in the individual states, and that the Federal Government has no authority in the subject. This is true, though in their necessary operation they do today often affect the people of other states, and, perhaps, may even conflict with our relationship with foreign Nations. Federal statutes relative to health are, therefore, practically advisory."

Plaintiff in error bases his contention that the State cannot legislate upon a subject when Congress has legislated upon it on certain rate cases and cases involving the commerce clause where *commercial relations* only were involved and not police powers of a state invoked to preserve the life and health of its citizens. While it is true that the State statutes are subject to the review of the Federal courts and may be set aside, such action is never predicated on the lack of power in the legislature of the state to enact such laws. The only question is, whether there is a legitimate exercise of them. If the power is exercised legitimately, the act is not void because it may conflict with the Federal Food and Drug Act in its standards.

The argument of plaintiff in error is not only unsound, but it is also unfortunate in view of the case of *Hipolite Egg Co.* v. *United States,* 220 U. S. 49. That was a libel under the Food and Drug Act of Congress, 1906, in which 50 cans of eggs were seized and confiscated because the eggs were preserved with boric acid. The District Court found that the eggs were adulterated by the use of boric acid as a preservative.

> "They contained approximately two per cent of boric acid which the court found was a deleterious ingredient and adjudged that they were adulterated within the meaning of the Food and Drug Act of June 30, 1906 C. 3,915, 34 Stat. 771." (p. 51.)

This judgment was affirmed by this Court.

Moreover, on December 31, 1914, the United States Department of Agriculture, acting through the Bureau of Chemistry, issued a bulletin that boric acid could not be used as a preservative of food under the U. S. Food and Drug Act. (S. R. A., Chem. 11.)

CONCLUSION.

Our conclusion is that the Illinois Dairy and Food Act prohibits the use of boric acid in food and prohibits the sale of any preservative for use in foods which contains boric acid; that such is the construction placed upon it by the highest Court in the State; that such construction will be adopted by this Court in passing upon its constitutionality; that this court will not pass upon its constitutionality under the State constitution; that but two contentions of plaintiff in error will be considered in this Court: (1) Whether the act as construed by the Supreme Court of Illinois contravenes the fourteenth amendment to the Federal Constitution; (2) whether the act contravenes the commerce clause of the Federal Constitution.

Our conclusion is further that the act is within the police powers of the State; that it has a real and substantial relation to the subject of health; that it was within the police powers of the Legislature to prohibit the use of boric acid in such preservative; that the act does not contravene the fourteenth amendment, either in regard to due process of law or the equal protection of the laws; that it is not repugnant to the commerce clause of the Federal Constitution, and that the doctrine of the original package decisions of this court do not apply to the packages in question, which were of a size to suit the convenience of local consumers.

We therefore respectfully submit that the judgment of the Supreme Court of the State of Illinois in this case should be affirmed.

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Of Counsel.

PRICE *v.* PEOPLE OF THE STATE OF ILLINOIS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 274. Argued May 12, 1915.—Decided June 21, 1915.

This court accepts the decision of the highest court of the State as to the construction of a pure food statute and whether specified articles are included within the prohibitions thereof, and then determines whether, as so construed, the statute is valid under the Federal Constitution.

The police power of the State extends to imposing restrictions having reasonable relation to preserving the health of its people.

The nature and extent of such restrictions are matters for legislative judgment in defining the policy of the State, and are within the power of the State unless palpably unreasonable and arbitrary.

A prohibition against the sale of food preservatives containing boric acid is not so unreasonable and arbitrary as to amount to deprivation of property without due process of law.

It is not enough to condemn a police statute as unconstitutional under the due process clause that the innocuousness of the prohibited article be debatable; for if debatable the legislature is entitled to its own judgment.

In enacting a police statute the legislature is not limited to general directions, but may prohibit the sale of such specific articles as it deems injurious.

The legislature may estimate degrees of evil and adjust its legislation according to the existing exigency; and, without offending the equal protection provision of the Constitution, may prohibit the sale of particular articles—such as food preservatives containing boric acid—if it does not exceed bounds of reasonable classification.

This court will not assume that goods are shipped from State to State in small retail packages, and where the character of the shipment is not shown, such packages cannot be classed with the "original packages" within the rule protecting such packages from subjection to the police laws of the State.

In this case no question of the conflict of the state law with action by Congress in regard to interstate shipment of food is involved.

The provisions of the Pure Food Law of Illinois of 1907 prohibiting sale of food preservatives containing boric acid are not unconstitutional under the due process or equal protection clauses of the Fourteenth Amendment, or as to the sales within that State of the articles involved in this action in the packages in which they were sold, under the Commerce Clause of the Federal Constitution.

257 Illinois, 587, affirmed.

THE facts, which involve the constitutionality under the Fourteenth Amendment of the Pure Food Statute of Illinois of 1907, are stated in the opinion.

Mr. Trafford N. Jayne for plaintiff in error.

Mr. Lester H. Strawn, Assistant Attorney General of the State of Illinois, with whom *Mr. Patrick J. Lucey*, Attorney General of the State of Illinois, was on the brief, for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is a writ of error to review a judgment of the Supreme Court of Illinois, which affirmed a judgment of the Municipal Court of Chicago, finding the plaintiff in error guilty of a violation of the 'Pure Food' statute of that State and imposing a fine. 257 Illinois, 587.

The violation consisted of a sale in Chicago of a preservative compound known as 'Mrs. Price's Canning Compound' alleged to be intended as a 'preservative of food' and to be 'unwholesome and injurious in that it contained boric acid.'

The statute (Laws of Illinois, 1907, p. 543, §§ 8 and 22, Ch. 127b; Hurd's Rev. Statutes, 2209, 2213, 2218) provides:

"§ 8. DEFINES ADULTERATION.] That for the purpose of this act an article shall be deemed to be adulterated: . . .

"In case of food: . . .

"Fifth—If it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided*, that when in the preparation of food products for shipment they are preserved by an external application, applied in such a manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservatives shall be printed on the covering of the package, the provisions of this act shall be construed as applying only when such products are ready for consumption; and formaldehyde, hydrofluoric acid, boric acid, salicylic acid and all compounds and derivatives thereof are hereby declared unwholesome and injurious. . . .

"§ 22. SALE OF PRESERVATIVES PROHIBITED.] No person, firm or corporation shall manufacture for sale, advertise, offer or expose for sale, or sell, any mixture or compound intended for use as a preservative or other adulterant of milk, cream, butter or cheese, nor shall he manufacture for sale, advertise, offer or expose for sale, or sell any unwholesome or injurious preservative or any mixture or compound thereof intended as a preservative of any food: *Provided, however*, that this section shall not apply to pure salt added to butter and cheese."

A trial by jury was waived. There was a stipulation of facts setting forth, in substance, that the defendant had sold in Chicago two packages of the preservative in question; that the compound contained 'boric acid'; that the label on the packages bore the following statement: "It is not claimed for this Compound that it contains anything of food value, but it is an antiseptic preparation, and among its many uses may be employed to prevent canned fruits and vegetables from souring and spoiling"; that the preservative was not offered for sale or sold in any food product, but only separately as a preservative; and that the defendant was accorded a hearing before the State Food Commission pursuant to the provisions of the Food law.

There was also introduced in evidence on behalf of the State an envelope, used for enclosing the compound, upon which were statements as to its uses, prices, etc. It was thus stated that the preservative could be used 'in canning all kinds of fruit,' and was 'especially valuable for corn, beans, peas,' etc. There was also the statement on the envelope that the contents 'of this package' were sufficient for 'four quarts' and that the retail prices were from ten cents for one 'package' to one dollar for fifteen 'packages.' That was the case for the State.

A motion to dismiss was denied. The plaintiff then made an offer of proof, and thereupon it was stipulated that a witness in court, if sworn, would testify that the "Price Canning Compound is an article of commerce, which has been sold under that distinct name for a period of years, with the ingredients and in the proportions contained in the sample taken by the Food Department, which is the subject of this suit; that it has acquired a wide reputation over a large number of States in the Union as a distinctive article, used for canning by the housewife"; that "it is not sold to manufacturers of food or canners of food for sale"; and that "boric acid is a constituent part of the compound and has been such during all the time that the compound has been sold."

Objection to evidence offered that "there is no added ingredient of any kind whatever, whether it be injurious, deleterious, or otherwise," was sustained as not being addressed to the charge made. The defendant (the plaintiff in error) also offered to prove "that boric acid is not injurious to health or to the human system" and that the "Price Canning Compound is not adulterated or mislabeled in any way." The offer was rejected, and the defendant excepted. In response to a further offer, it was conceded that the witness, if placed upon the stand, would testify that the compound "is an article of commerce, sold in Illinois in the original package manufactured in Minnesota."

Upon this state of the record, the contention of the plaintiff in error that the statute was inapplicable, or, if applicable, was repugnant to the constitution of the State, and to the Commerce Clause and the Fourteenth Amendment of the Federal Constitution, were overruled.

The Supreme Court of the State thus construed the statute:

"We will first notice the objection of plaintiff in error that section 8 deals only with foods; that the declaration in that section that boric acid is injurious and unwholesome is limited to foods containing that substance as an added ingredient, and has no application to a preservative which is not, and does not purport to be a food.

"Both sections 8 and 22 are parts of one act, and the act as a whole, should be so construed as to give effect to its manifest purpose and intent. Its main purpose is to protect health by preventing adulteration of food by any unwholesome and injurious ingredient. Boric acid is declared to be unwholesome and injurious, and the sale of any food to which it is an added ingredient is prohibited. It was well known to the legislature that various compounds are manufactured and sold for preserving foods of different kinds. If such preservatives contain unwholesome and injurious ingredients, their use by the housewife, or any one else, in preserving fruits or food, would be as injurious to the health as if they had been added by a dealer or manufacturer to fruits or other foods before placing them on the market. The object of the act is to protect the public health by preventing dealers from selling food to which had been added, for the purpose of preserving it, ingredients injurious to the health, or from selling any compound as a preservative which contained any such ingredients. The prohibition is not against the sale of all preservatives, but is against only unwholesome or injurious preservatives. . . . It is just as important to prohibit the sale to the housewife of a compound containing boric acid, to be used by her to preserve fruits and vegetables put up by her for family use, as it is to prohibit the sale of fruits and vegetables after such an ingredient has been added. We think the reasonable construction of the act to be that the prohibition against boric acid is not limited to foods to which it is an added ingredient, but extends to compounds sold as a food preservative which contain boric acid. The danger to health is as great from one as the other, and the prohibition of both was necessary to effect the evident purpose of the legislature." 257 Illinois, pp. 592, 593.

The plaintiff in error challenges the correctness of this construction, but this question is simply one of local law with which we are not concerned. We accept the decision of the Supreme Court of the State as to the meaning of the statute, and, in the light of this construction, the validity of the act under the Federal Constitution must be determined. *Missouri Pacific Ry.* v. *Nebraska*, 164 U. S. 403, 414; *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 466; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 73; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 198.

The first Federal question is presented by the contention that the statute, as applied, effects a deprivation of property without due process of law and a denial of the equal protection of the laws contrary to the Fourteenth Amendment.

The State has undoubted power to protect the health of its people and to impose restrictions having reasonable relation to that end. The nature and extent of restrictions of this character are matters for the legislative judgment in defining the policy of the State and the safeguards required. In the avowed exercise of this power, the legislature of Illinois has enacted a prohibition—as the statute is construed—against the sale of food preservatives containing boric acid. And unless this prohibition is palpably unreasonable and arbitrary we are not at liberty to say that it passes beyond the limits of the State's protective authority. *Powell* v. *Pennsylvania*, 127 U. S. 678, 686; *Crowley* v. *Christensen*, 137 U. S. 86, 91; *Holden* v. *Hardy*, 169 U. S. 366, 395; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 246; *Jacobson* v. *Massachusetts*, 197 U. S. 11, 25; *Silz* v. *Hesterberg*, 211 U. S. 31, 39; *McLean* v. *Arkansas*, 211 U. S. 539, 547; *Chicago, Burlington & Quincy R. R.* v. *McGuire*, 219 U. S. 549, 569; *Purity Extract Co.* v. *Lynch*, *supra; Hammond Packing Co.* v. *Montana*, 233 U. S. 331, 333. The contention of the plaintiff in error could be granted only if it appeared that by a consensus of opinion the preservative was unquestionably harmless with respect to its contemplated uses, that is, that it indubitably must be classed as a wholesome article of commerce so innocuous in its designed use and so unrelated in any way to any possible danger to the public health that the enactment must be considered as a merely arbitrary interference with the property and liberty of the citizen. It is plainly not enough that the subject should be regarded as debatable. If it be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of a jury upon the issue which the legislature has decided. It is not a case where the legislature has confined its action to the prohibition of that which is described in general terms as unwholesome or injurious, leaving the issue to be determined in each case as it arises. The legislature is not bound to content itself with general directions when it considers that more detailed measures are necessary to attain a legitimate object. *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280, 288. Legislative particularization in the exercise of protective power has many familiar illustrations. The present case is one of such particularization, where the statute—read as the state court reads it—specially prohibits preservatives containing boric acid. The legislature thus expressed its judgment and it is sufficient to say, without passing upon the opinions of others adduced in argument, that the action of the legislature cannot be considered to be arbitrary. Its judgment appears to have sufficient support to be taken out of that category. See *Hipolite Egg Co.* v. *United States*, 220 U. S. 45, 51; Circular No. 15 (June 23, 1904), Bureau of Chemistry; Food Inspection Decision 76 (July 13, 1907); Bulletin (December 31, 1914), Bureau of Chemistry;—U. S. Department of Agriculture.

It is further urged that the enactment, as construed, contains an unconstitutional discrimination against the plaintiff in error, but in this aspect, again, the question is whether the classification made by the legislature can be said to be without any reasonable basis. The legislature is entitled to estimate degrees of evil and to adjust its legislation according to the exigency found to exist. And, applying familiar principle, it cannot be said that the legislature exceeded the bounds of reasonable discretion in classification when it enacted the prohibition in question relating to foods and compounds sold as food preservatives. *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S. 251, 256; *Heath & Milligan Co.* v. *Worst*, 207 U. S. 338, 354; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78; *Mutual Loan Co.* v. *Martell*, 222 U. S. 225, 235; *Eberle* v. *Michigan*, 232 U. S. 700, 706; *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227; *Miller* v. *Wilson*, 236 U. S. 373, 383, 384. We find no ground for holding the statute to be repugnant to the Fourteenth Amendment.

The remaining contention is that the statute as applied violates the Commerce Clause. Treating the article as one on a footing with adulterated food, the power of the State to prohibit sales within its borders is broadly asserted on its behalf. On the other hand, the plaintiff in error insists that the compound is not an adulterated food, and was not charged to be such, but was an article of commerce manufactured in another State; and that whatever may be the power of the State of Illinois over manufacture and sale apart from interstate commerce, the State could not prohibit its introduction and sale in the course of interstate commerce. It is not necessary, however, to deal with the question in the scope thus suggested. The sole ground for invoking the Commerce Clause in order to escape the restrictions of the state law is sought to be found in the doctrine with respect to sales in original packages. *Brown* v. *Maryland*, 12 Wheat. 419; *Leisy* v. *Hardin*, 135 U. S. 100; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 22, 23. The record, however, is wholly insufficient to support the contention. The stipulation of facts read in evidence by the State set forth that the defendant had sold in Chicago 'two packages' of the compound. The State then introduced in evidence an 'envelope used for enclosing the compound.' This, among other things, bore a statement that the content of "this package is sufficient for four quarts." And it set forth prices as follows: "Retail Price. 1 Package 10c. 3 Packages 25c. 7 Packages 50c. 15 Packages $1.00." The clear inference from this evidence was that the compound was offered for sale at retail in small packages (in envelopes) suitable for the consumer. The defendant made an offer of proof, and in lieu of the offered testimony it was conceded that the witness, if sworn, would testify that the compound mentioned in the statement of claim "is an article of commerce sold in Illinois, in the original package manufactured and made in Minnesota." As to the nature of the package, nothing more was shown. All that was admitted was entirely consistent with the view that the original package referred to was simply the small package in the envelope which the State had described, and no error can be charged to the state court in so regarding it. Nothing appeared as to the character of the shipment from Minnesota to Illinois, and it would be wholly unjustifiable to assume that, in commercial shipments into the State, the small package was segregated or separately introduced. If these small packages were associated in their shipment into the State, as they naturally would be, and were subsequently sold separately or in various lots, these separate packages although respectively in the original envelopes would not be classed as 'original packages' within the rule invoked, so as to escape the local law governing domestic transactions. We have repeatedly so held, in cases not materially different in this respect. *Austin* v. *Tennessee*, 179 U. S. 343; *Cook* v. *Marshall County*, 196 U. S. 261; *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 199–201. The testimony offered by the plaintiff in error, and treated as received, taken in connection with what had already been proved as to the character of the packages put up for retail sale, fell far short of the proof required to constitute a defence upon the ground that the state law, otherwise valid, was applied in contravention of the Commerce Clause.

It should be added that no question is presented in the present case as to the power of Congress to make provision with respect to the immediate containers (as well as the larger receptacle in which the latter are shipped) of articles prepared in one State and transported to another, so as suitably to enforce its regulations as to interstate trade. *McDermott* v. *Wisconsin*, 228 U. S. 115, 135. It does not appear that the state law as here applied is in conflict with any Federal rule.

Judgment affirmed.